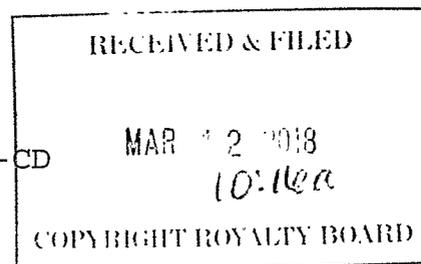# LIBRARY OF CONGRESS

UNITED STATES COPYRIGHT ROYALTY JUDGES

The Library of Congress

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IN THE MATTER OF:)

)   Docket No.

DETERMINATION OF CABLE   )   14-CRB-0010-CD

ROYALTY FUNDS   )   (2010-2013)

-------------------------X

CONDENSED TRANSCRIPT WITH KEYWORD INDEX

OPEN SESSIONS

Pages: 2432 through 2660 (with excerpts)

Place: Washington, D.C.

Date: March 7, 2018

2432

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 1        UNITED STATES COPYRIGHT ROYALTY JUDGES
 2              The Library of Congress
 3   ------------------------X
 4   IN THE MATTER OF:        )
 5                            )  Docket No.
 6   DETERMINATION OF CABLE   )  14-CRB-0010-CD
 7   ROYALTY FUNDS            )  (2010-2013)
 8   ------------------------X
 9   BEFORE:    THE HONORABLE SUZANNE BARNETT
10              THE HONORABLE JESSE M. FEDER
11              THE HONORABLE DAVID R. STRICKLER
12
13              Library of Congress
14              Madison Building
15         101 Independence Avenue, S.E.
16              Washington, D.C.
17              March 7, 2018
18
19              9:02 a.m.
20              VOLUME XI
21
22
23   Reported by:  Karen Brynteson, RMR, CRR, FAPR
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2433

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1                    P R O C E E D I N G S
2                              (9:02 a.m.)
3              JUDGE BARNETT:  Good morning.  Please
4    be seated.
5              Mr. Dove?
6              MR. DOVE:  Would you like to swear the
7    witness, Your Honor?
8              JUDGE BARNETT:  Oh, I could do that.
9              (Laughter.)
10   Whereupon--
11                    LINDA MCLAUGHLIN,
12   having been first duly sworn, was examined and
13   testified as follows:
14             JUDGE BARNETT:  Please be seated.
15                    DIRECT EXAMINATION
16   BY MR. DOVE:
17        Q.    Good morning, Ms. McLaughlin.
18        A.    Good morning.
19        Q.    Would you please state your name for
20   the record.
21        A.    Linda McLaughlin.
22        Q.    What is your current position?
23        A.    I'm an affiliated consultant at NERA,
24   an economic consulting firm.
25        Q.    And when did you begin in that
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1    position?
2         A.    2014.
3         Q.    Did you hold prior positions at NERA?
4         A.    Yes.  I've worked at NERA since 1974.
5    I started as a consultant and worked my way up
6    over the course of time to senior vice
7    president.  I retired from full-time work in
8    2009, and then I was called a special
9    consultant, and they changed the titles again,
10   and affiliated consultant.  Maybe I'll go back
11   to consultant at the end of this.
12        Q.    And how long have you been affiliated
13   with NERA?
14        A.    For over 40 years, since 1974.
15        Q.    Ms. McLaughlin, what is your
16   educational background?
17        A.    I have a Bachelor of Science degree in
18   math from Marquette University, and a Master's
19   degree in economics from the University of
20   Pennsylvania.
21        Q.    At NERA, in general, what kinds of
22   work do you do?
23        A.    I do microeconomics, generally in
24   contested matters like this, antitrust and
25   intellectual property areas for the most part,
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1    sometimes commercial damages.
2         Q.    And are there particular industry
3    areas in which you tend to concentrate?
4         A.    Yes.  I have done a lot of work in
5    media and entertainment.
6         Q.    And for approximately how many years
7    have you concentrated in the media and
8    entertainment area?
9         A.    For more than 30 years.
10        Q.    Have you previously testified before
11   the Copyright Royalty Judges or their
12   predecessors as an economic expert regarding
13   copyright licensing or the valuation of
14   copyrighted works?
15        A.    Yes, I have.
16        Q.    Could you please describe that
17   testimony or identify that testimony.
18        A.    So I think the first was in a rate
19   determination for carriage on satellite of
20   television stations, and then I -- and that was
21   -- that was for PBS.  And then the second was
22   for MPAA, and that was in the split-up of the
23   satellite royalty fund.  And that -- that was
24   just a report or testimony, written testimony.
25   I believe there was a settlement.  It didn't go
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2440

1 to the hearing.
2   Then in the 2000 to 2003 rate
3 determination in cable of the split-up of the
4 cable pool, similar to this. And the same
5 thing in 2004-'05.
6   Q.   And in the 2000 to 2003 cable royalty
7 distribution proceeding, who were you retained
8 by in that proceeding?
9   A.   In the last two, both of those were
10 for -- well, one was for PBS and the NAB. That
11 was the 2000 to 2003. And the other was PBS.
12   Q.   Do you recall -- let's -- I guess,
13 going back to the satellite rate adjustment
14 proceeding, do you recall in that proceeding,
15 did the Judges adopt the methodology that you
16 put forward?
17   A.   Yes, I think they did.
18   Q.   And how about in the 2004-'05
19 proceeding? Did the Judges adopt your
20 augmentation in that proceeding?
21   A.   Yes. I -- I did something similar to
22 what I'm doing now, augmenting Bortz study, and
23 that was used as a starting point by the
24 Judges.
25   Q.   Thank you. Ms. McLaughlin, have you

2441

1 testified or filed reports in other types of
2 proceedings as an economic expert regarding the
3 economic attributes of entertainment and media
4 markets?
5   A.   Yes.
6   Q.   Would you please provide a few
7 examples of that testimony.
8   A.   Yes. I submitted testimony to the FCC
9 in the -- in a proceeding concerning cable
10 rates and the effect of competition on them.
11 Also to the FCC about bargaining power between
12 cable operators and cable networks. And to the
13 FTC on pricing of streaming music services.
14   Then also in federal court, a matter
15 between HBO and a pay-per-view operator
16 concerning the pay-per-view rights to a fight.
17 An arbitration, a matter between Cablevision
18 and the YES Sports Network about what tier the
19 sports network should be carried on.
20   That, you know --
21   Q.   Let me drill down. In -- with regard
22 to in the course of your work, have you ever
23 analyzed -- had the need to analyze surveys and
24 other statistical studies?
25   A.   Yes. The cable rate hearing was

2442

1 largely about -- not hearing, I'm sorry -- the
2 FCC cable rate inquiry was focused on
3 econometric studies of how competition affects
4 cable rates.
5   On the survey side, I've worked with
6 Nielsen and other viewing data since one of my
7 first projects at NERA, about TV stations in
8 New York and Philadelphia and the people in the
9 middle, what they did, and where, you know,
10 special surveys were done to analyze in more
11 detail than would normally be given in -- in
12 published reports.
13   In the Cablevision case, that also
14 involved surveys, not only the Nielsen data on
15 viewing that Yes would use to sell its
16 advertising time but also in the -- a telephone
17 survey about consumers watched Yankee games,
18 whether they were just available to all cable
19 subscribers or restricted on a special tier.
20   Q.   Thank you.
21   MR. DOVE: Your Honors, at this time,
22 we offer Ms. McLaughlin as an expert economist
23 with experience in the economic attributes of
24 entertainment and media markets and the
25 valuation of copyrighted works within those

2443

1 markets.
2   JUDGE BARNETT: Hearing no objection,
3 Ms. McLaughlin is so qualified.
4   MR. DOVE: May I approach the witness
5 and the bench?
6   JUDGE BARNETT: You may.
7 BY MR. DOVE:
8   Q.   Ms. McLaughlin, I just handed you a
9 binder of exhibits that contains Exhibit 3012.
10 We've also included in the binder Exhibits
11 1001, 3000, 3002 through 3008, and 3012 for
12 potential reference, but right now I want to
13 focus on Exhibit 3012.
14   And I'd like you to examine that,
15 please, and tell me whether this is the written
16 testimony of you and Dr. Blackburn of April
17 17th, 2017.
18   A.   Yes.
19   Q.   And I'd like you to please turn to
20 attachment 1 of Exhibit 3012. And I'd like to
21 ask you, is this a description of your
22 experience and qualifications?
23   A.   Yes. It's called Appendix 1, but --
24   Q.   Okay.
25   A.   Yes, it's a description.

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1       Q.    Who is Dr. David Blackburn?
2       A.    David is a director at NERA.  He works
3   out of the Washington, D.C. office.  I've
4   worked with him, and he's an economist that
5   I've worked with on other recent projects, as
6   well as this one.
7       Q.    Turning to attachment 2 of
8   Exhibit 3012, is this a description of
9   Dr. Blackburn's experience and qualifications?
10      A.    Yes.
11      Q.    And did you and Dr. Blackburn
12  collaborate to prepare the testimony in
13  Exhibit 3012?
14      A.    Yes.
15      Q.    What were your respective roles?
16      A.    Well, Dr. Blackburn worked under my
17  direction.  I -- we talked back and forth about
18  the information we were looking at in the
19  report and the actual words in the report.  And
20  I asked him to look into certain things more
21  closely than I did, but I would just say he
22  worked under my direction.
23      Q.    And do you have any corrections to
24  Exhibit 3012?
25      A.    The only thing I noticed when I was
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2445

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1   reading through this recently is we reference a
2   wrong footnote number, and footnote 18, it says
3   as we noted in footnote 15, but it should
4   really be 16.  And they're both on the same
5   page, so it's pretty easy to see that.
6       Q.    Okay.  Any other corrections?
7       A.    No.
8       Q.    Thank you.  Ms. McLaughlin, on whose
9   behalf are you appearing here today?
10      A.    Public Broadcasting Service.
11      Q.    And what were you asked to address in
12  your direct testimony?
13      A.    I was asked to address the share of
14  the royalties that -- from the -- that PBS
15  should receive from the distribution of its
16  signals in a distant -- on distant cable
17  systems.
18      Q.    And was this a determination of
19  relative value?  Were you looking at relative
20  value?
21      A.    Yes, the relative value of the PTV --
22  of PTV -- I'm sorry about the PBS/PTV, but I've
23  been calling it PTV in my report.
24            So the distribution of the relative
25  value or what is the relative value of the PTV
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1   signal compared with other distant signals that
2   are imported by cable systems in 2010 to 2013.
3       Q.    And we're going to walk through those
4   -- your conclusions in detail, but just, first,
5   I was wondering if you could explain just, you
6   know, did you -- well, did you reach any
7   conclusions as to the questions you were asked
8   to address?
9       A.    Yes.
10      Q.    And just in general, what did you
11  conclude?
12      A.    Well, I concluded as to the amount of
13  the rate, that it should be at least -- by
14  rate, I mean the relative value -- at least
15  9.9 percent and perhaps as much as
16  20.8 percent.
17            I reached this conclusion based on
18  looking at changed circumstances since 2004-'05
19  beginning with the rate that was established at
20  that time, the relative value that was
21  established at that time for PTV, and first
22  looking at the changes in distant subscriber
23  instances, which is just a measure of units,
24  but it was a quite striking one, and then
25  looking at measures of value or other measures
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2447

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1   that would indicate the extent to which what I
2   first saw in units was reflected in value.
3       Q.    And then after you looked at the
4   changed circumstances, did you -- did you also
5   look at sort of the estimates that were
6   actually presented by some of the other parties
7   in this proceeding?
8       A.    Yes.  Changed circumstances includes
9   the current -- is going from the past to the
10  current.  And if you just looked at the
11  current, it should come out, you know, in a
12  similar way.  And, in fact, it did.
13            So I compared the estimates that I got
14  that way with what the -- with what some other
15  parties said as what their relative value for
16  PTV would be.
17            JUDGE STRICKLER:  Excuse me, counsel.
18            MR. DOVE:  Sure.
19            JUDGE STRICKLER:  Good morning.  How
20  are you?
21            THE WITNESS:  Good morning.
22            JUDGE STRICKLER:  I have a question
23  for you, just so I understand, to orient myself
24  to your testimony and consistent with your
25  testimony just now at the bottom of page 2 of
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1   your report, together with David Blackburn, you
2   say that you expanded upon what was done in the
3   2004-2005 determination based on the increase
4   in carriage of Public Television stations,
5   correct?
6   THE WITNESS: Right, in terms of the
7   change in -- percentage change in subscriber
8   instances, yes.
9   JUDGE STRICKLER: And then on the next
10   page on page 3, in the first bullet point on
11   that page, you begin by saying "in addition."
12   THE WITNESS: Right.
13   JUDGE STRICKLER: I just want to
14   understand what you mean by "in addition" in
15   that context. Are you saying that on top of
16   that carriage-oriented and increased viewing or
17   subscribership, I should say, that you
18   mentioned in the previous bullet point, this is
19   additive or are you saying it's an additional
20   way of looking at it by reflecting on the
21   additional evidence that you measure, the
22   econometric values, the survey values? So is
23   it an alternative, an additional methodology,
24   or is it a -- are you doing a build-up?
25   THE WITNESS: It's not a build-up. If

2449

1   I understand, it's not first you take this
2   change in share and then you -- in subscriber
3   instances, and then on top of it, you add these
4   other changes in value.
5   Rather, that the change in this units
6   measure may indicate a change in value or
7   perhaps the value of each unit went down,
8   relatively went down. It could have down, up,
9   or stayed the same.
10   So I'm looking at these and other
11   measures of value to see if the units change is
12   reflecting a relative change in value.
13   JUDGE STRICKLER: Okay. Just so I
14   understand it, does "in addition" mean an
15   alternative approach to check and confirm the
16   first approach, the first bullet point on --
17   THE WITNESS: Right.
18   JUDGE STRICKLER: Is that what it
19   means or is it cumulative?
20   THE WITNESS: Well, it's cumulative in
21   the sense that it's not just -- it's not just
22   to check it, but it is also to check it. All
23   right?
24   So if there's -- if there's a change
25   in units -- I said it at the beginning in terms

2450

1   of the numbers. The change in units alone
2   would imply a relative market value for PTV of
3   9.9 percent. When I see values going up at
4   least as much or more, then I can say at least
5   9.9 percent. Do you see -- based on the units.
6   But then I can look at the value
7   measures themselves and say: Well, if you just
8   look at the change in value, knowing that there
9   had been this units increase as part of the
10   reason the value is changing, there's more of
11   it and it's valued at a higher amount. Then
12   you could just look at those as well.
13   JUDGE STRICKLER: So the 20.8 percent
14   that you mention is, in fact, cumulative? It's
15   looking at the additional number of units and
16   the additional evidence that you summarize --
17   THE WITNESS: Right. The --
18   JUDGE STRICKLER: -- in the second
19   bullet point?
20   THE WITNESS: Yes, the 20.8 percent
21   comes from a change in a value measure alone.
22   All right? And that value measure has --
23   involves both a change in price, a change in
24   the amount of minutes, and a change in the
25   amount of carriage.

2451

1   JUDGE STRICKLER: Thank you.
2   BY MR. DOVE:
3   Q.   Ms. McLaughlin, let's turn to your
4   analysis of changed circumstances between
5   2004-'05 and 2010-'13 in the distant signal
6   marketplace as relevant to Public Television.
7   What sort of data or information did
8   you review or consider in addressing that
9   issue?
10   A.   I use data from the CDC, Cable Data
11   Corp., the past determinations, and both the
12   reports of people that were -- other people
13   submitted in this proceeding and their -- and
14   some of the data underlying those reports.
15   Q.   And what types of reports are you
16   referring to that were submitted in this
17   proceeding?
18   A.   Reports that looked at -- by other
19   experts, so Mr. Trautman, Dr. Horowitz,
20   Dr. Crawford, and so forth, as well as similar
21   reports from the 2004-'05 proceeding because
22   I'm looking at some changes -- at changes.
23   Q.   Let's take those then one at a time.
24   First, what specific steps did you take to
25   analyze the data from Cable Data Corporation to

2452

1 address whether the relative value of distant
2 Public Television signals had changed?
3   A.   Well, the first thing I looked at was
4 the change in subscriber instances. And that's
5 -- so that's one subscriber receiving one
6 distant Public Television station or one
7 distant station of any type.
8   And I looked -- I saw how the
9 different types of programs -- the different
10 types of signals, Public Television,
11 independent stations, networks, Canadian, low
12 power, how they changed and in total how all of
13 the importation of distant signals changed
14 compared to any subscribers and systems that
15 imported anything. There are some systems that
16 don't import anything.
17   Q.   Is there a table that shows the
18 results of that, of what you saw?
19   A.   Yes, my chart 1.
20   Q.   Let's pull up chart 1. What does
21 chart 1 show?
22   A.   Chart 1 shows, if you just look at the
23 entire bar, that the total of subscriber
24 instances per subscriber went down from
25 2004-'05 to 2010-'13. So the bar is shorter.

2453

1 It went down from 1.45 to 1.28.
2   And the PTV increased during that
3 time, the little part on the bottom, from .176
4 to .204 per -- so a cable subscriber received
5 about 17 -- you know, about 17 and a
6 half percent of them received one signal, and
7 then, you know, about 20 percent of them
8 received one signal in the second time period.
9   However, they're receiving fewer
10 signals and all of the other types of
11 programming, independent stations, et cetera,
12 went down per subscriber. So one went -- PTV
13 went up and the others went down.
14   Q.   Let's turn to chart 2 of your report.
15 What does this chart show?
16   A.   In this chart, I look at the same
17 information but just look at the percent
18 distribution of the distant subscriber
19 instances. And so here it shows that PTV's
20 share went up from 12 percent to 12.1 percent
21 to 15.9 percent, which is a 32 percent
22 increase.
23   Q.   And what happened with regard to the
24 other types of signals?
25   A.   Well, the network signals went down a

2454

1 lot. In terms of percentage, Canadian and low
2 power went up because -- and the independents
3 went up a small amount.
4   Now, they went up because there was
5 such a decline in the others that, even though
6 the number went down, the percentage went up.
7   Q.   And what did you conclude from this
8 analysis?
9   A.   That the subscriber instances for PTV
10 increased by a lot. And if you were to use
11 that measure alone, which as I said, I didn't
12 just use that measure alone, but if you were to
13 just use that measure alone, that the rate --
14 the relative value in 2004-'05 that the
15 previous Judges determined, which was
16 7.55 percent of the Basic Fund excluding music,
17 that that would have increased by -- if that
18 increased by 32 percent, that would bring us up
19 to the 9.9 percent of relative value for PTV
20 that I mentioned earlier.
21   Q.   And I think you -- I know you
22 testified to this to some extent, but just to
23 be clear, do you think that distant subscriber
24 instances are the best possible evidence of
25 relative marketplace value?

2455

1   A.   No. I think you have to put it
2 together with something that has the price part
3 of the equation in it, not just the -- not just
4 the -- not just the units but the value as
5 well. So that's why I looked at these other
6 measures.
7   Q.   I'd now like to turn to the subject of
8 cable operator surveys. Whose testimony
9 regarding cable operator surveys did you
10 consider in addressing changed circumstances
11 from 2004-'05 to 2010-'13?
12   A.   I looked at the Bortz -- really my own
13 testimony from 2004-'05, the augmented Bortz
14 report, which relied on Dr. -- on
15 Mr. Trautman's work, and just augmented it to
16 add the signals that he had left out.
17   And then I looked at that, again, in
18 -- I did that same thing in 2010 to '13. And
19 then in the 2010-'13, I also looked at the
20 survey done by Dr. Horowitz.
21   Q.   Let's talk about Mr. Trautman's Bortz
22 survey first. On page 14 of your testimony,
23 you discuss an adjustment to the Bortz survey,
24 both in 2004-'05 and in 2010-'13.
25   Why did you decide that you needed to

2456

1 adjust the Bortz survey?
2   A.   The Bortz survey asks -- takes a
3 sample of cable operators and asks -- and wants
4 to ask them how they would apportion the value
5 of the signals they carry. They -- but they
6 deemed some people ineligible. They selected
7 them in the sample, but they were ineligible
8 for the survey. And those -- those cable
9 operators were people who imported only PTV
10 signals or only Canadian signals or a PTV and a
11 Canadian signal but nothing else.
12   So what I'm doing is adding them back
13 in so that they can -- we can have a picture of
14 all the cable operators. Or a sample of all
15 the cable operators.
16   Q.   And I believe you may have testified
17 to this earlier, but did the Judges in the
18 2004-'05 proceeding rely on your testimony
19 regarding adjustment of the Bortz survey?
20   A.   They used it as a starting point for
21 their determination of the relative values.
22   Q.   In the 2004-'05 Bortz survey, how many
23 cable systems were excluded from that Bortz
24 survey, even though they imported a Canadian or
25 Public Television distant signal?

2457

1   A.   In each year, I think it was ten.
2   Q.   And how about in 2010 to 2013? In
3 those years -- or in the Bortz survey for those
4 years, how many cable systems were excluded
5 from that Bortz survey even though they
6 imported a Canadian or Public Television
7 distant signal? And so this is not a memory
8 exercise, for your convenience we put up here a
9 slide that shows that relevant footnote from
10 Mr. Trautman's report.
11   A.   Yes. In the -- over the four years,
12 it was an average, I think, of 16, but it was a
13 different number in each year. So the
14 highlighted part here says in 2010, is talking
15 about 15 PBS-only and 2 Canadian. So that
16 would be 17 for that year.
17   But there are different numbers for
18 the different years, 17 PBS-only in 2011, et
19 cetera.
20   Q.   In order to do your augmentation of
21 the Bortz survey, what were your initial
22 assumptions?
23   A.   I assumed that the systems that I was
24 adding back in would have to answer the survey
25 in the same way it was asked for the other

2458

1 people, and that is they were only allowed to
2 respond to the category they are carrying and
3 they are supposed to split up their value among
4 the categories they are carrying.
5   So they would have to say 100 percent
6 for PTV, if that's all they carried. And if
7 all they carried was Canadian signal, they'd
8 have to say 100 percent for Canadian. And if
9 they carried both, they'd have to say something
10 between, you know, zero for one and 100 to the
11 other or 100 for one and zero to the other.
12   Q.   How about with regard to response
13 rate? Did you make any assumptions about that?
14   A.   Oh, when I added them in, I -- I
15 followed the same response rate. If you look
16 at the -- some of the highlighted numbers, so
17 in the final eligible sample for the year that
18 we're looking at, 2010, in all the strata
19 together, there were 288 cable systems but only
20 163 of them completed the surveys.
21   So the response rate, 163 over 288,
22 or, you know, maybe that's, you know,
23 60 percent, say, 50, 60 percent. So I used
24 that same response rate and I did it actually
25 by strata and applied that to the omitted

2459

1 signal. So I didn't assume that all 16 were
2 included. I only assumed, you know,
3 approximately half of the 16 were included.
4   Q.   In the most simplified form possible,
5 would you please explain how you went about
6 adjusting the Bortz results in 2010 to 2013.
7 And you can feel free to use this Trautman's
8 Table II-1, if that's helpful to you, in
9 providing this overarching description.
10   A.   Okay. So the -- just talking without
11 the -- talking about the strata, the 163
12 completed surveys, those people gave in
13 aggregate an answer for PTV value, and there's
14 another page in the Trautman report or the
15 Bortz report that says that value.
16   Q.   It's on, I think, on page 3 of
17 Exhibit 1001.
18   A.   Sorry, I just don't want to say the
19 wrong number and start off -- yes, in that
20 year, the survey respondents gave 4.4 percent
21 of the value -- said 4.4 percent of the
22 relative value was PBS. And so I say: Well,
23 the 163, multiplied by 4.4 percent, the portion
24 of the 15 PBS-only signals, say 8 of the 15
25 that would have responded, would give

2460

1   100 percent. The two -- the portion of the
2   two, say, one of the two Canadian systems that
3   would have responded would say zero for PTV.
4   And then I would, you know, multiply that out
5   and divide it by the sum of the 163, the eight
6   PBS-only that would have responded and the one
7   Canadian-only that would have responded.
8   Q.   And did you give this simplified
9   explanation anywhere in your written testimony?
10   A.   I explained it in my 2004-'05
11   testimony.
12   Q.   And the actual process you went
13   through to recalculate the Bortz survey results
14   was a little more complicated than that
15   simplified explanation you just described,
16   correct?
17   A.   Yes.
18   Q.   And what else did you have to do to
19   adjust the Bortz results?
20   A.   Well, first, I -- the Bortz survey was
21   done by strata. That is the different size of
22   the systems as is shown on that table, that the
23   small, medium, sort of larger and very largest.
24   And then it was -- in each strata,
25   there was different response rates, so I used

2461

1   the response rates that were applied to the
2   strata.
3   In the -- the Bortz survey doesn't
4   just use each response to weight it equally.
5   It weights them by their royalties. So I
6   weighted each of the people I'm adding in by
7   their royalties.
8   And then at the end, it re-weights all
9   of the strata by the royalties in the --
10   the percent of the royalties that is in the
11   universe as opposed to in the sample. So I did
12   that re-weighting.
13   Q.   And did you describe the details of
14   the stratification and weighting process in
15   your written testimony?
16   A.   In the 2004-'05 testimony, I had an
17   appendix that did that.
18   Q.   And you used the same process in 2010
19   to '13 and provided all of your calculations to
20   the parties in discovery?
21   A.   Yes.
22   Q.   If we could turn now to chart 3.
23   After you performed the recalculation in
24   2004-'05, what was the adjusted Bortz survey
25   result for Public Television in that year?

2462

1   A.   In 2004-'05, it was shown on the first
2   bar there, between 6.1 percent to 6.2 percent
3   with the variation depending on what the people
4   who carried both a PTV and a Canadian would
5   say.
6   Q.   So that's why you present that figure
7   as a range?
8   A.   Yes.
9   Q.   And is that why there is also a range
10   for the Canadian Claimants group at the top of
11   the chart?
12   A.   Yes.
13   Q.   Sticking with the left side of chart
14   3, how are these other five categories in the
15   middle different from the unaugmented Bortz
16   survey for 2004-'05?
17   A.   Well, to the extent that the PTV
18   category -- and Canadian category got bigger,
19   the others shrunk. The percents have to add up
20   to 100 percent.
21   Q.   Now, in his written rebuttal
22   testimony, Mr. Trautman states that Public
23   Television should not be credited with
24   100 percent of the value of the programming on
25   PTV-only systems based on the Horowitz surveys.

2463

1   Do you agree with that?
2   A.   No.
3   Q.   And why not?
4   A.   Because the way these surveys were
5   conducted of the people who did respond, they
6   were told: Give us the -- divide up your value
7   in percentage terms between these different
8   categories of the programming that you carry,
9   and make sure the percents add up to
10   100 percent.
11   And then at the end if -- they were
12   reminded: Make sure the percents add up to
13   100 percent. Particularly, I guess, if they
14   didn't, so that they would make them add up to
15   100 percent.
16   And so in order to be consistent with
17   people that actually responded to the Bortz
18   survey and had to have their answers add up to
19   100 percent, however they -- however they
20   divided them, people who carried only PTV would
21   have to say how would I split up the PTV; I
22   would give it all 100 percent because I'm not
23   carrying any other category? The same thing
24   with the Canadians.
25   Q.   So let's turn back, again, to chart 3.

2464

1   What does the right-hand side of chart 3 show?
2   A.   The right-hand side shows the
3   augmented Bortz survey relative values in
4   2010-2013, and for PTV it shows a range of 7
5   and a half to 8 and a half percent.
6   Q.   And how much of a change is that from
7   2004-'05?
8   A.   31 percent.
9   Q.   What explains in your view the
10   increase in the augmented Bortz valuation of
11   Public Television from 2004-'05 to 2010-'13?
12   A.   Well, there's two parts to it. One is
13   the people who answered the Bortz survey, the
14   actual respondents, gave more to PTV in the
15   second period compared to the first period. On
16   average, they gave -- you know, we use that 4.4
17   as an example, but on average they gave
18   5.1 percent in the later period, and it was
19   something in the 3 percent areas in 2004-'05, 3
20   point something.
21   So, first, the people who actually
22   responded gave more and, second, there was
23   somewhat more PTV-only or PTV plus Canada-only
24   in the second period compared to the first.
25   Q.   Is the change in Public Television's

2465

1   augmented Bortz survey valuation consistent
2   with the change in Public Television's distant
3   subscriber instances that we discussed earlier
4   with respect to chart 2?
5   A.   Yes, just based on those two pieces of
6   information, you would say that there was
7   approximately the same increase in value as
8   measured by the Bortz survey as there was just
9   in subscriber instances as we first discussed.
10   9.9 percent would be the resulting value if you
11   applied the -- either percent.
12   Q.   Now, in 2010 to '13, was there a cable
13   operator survey that included all eligible
14   cable systems, including those whose only
15   distant carriage was Public Television
16   stations?
17   A.   Yes.
18   Q.   And which survey was that?
19   A.   The Horowitz survey.
20   Q.   And is this illustrated in chart 4 of
21   your report?
22   A.   Yes. In chart 4, I compare the
23   Horowitz survey in the current period to the
24   augmented Bortz survey in the prior period, and
25   I make that comparison to the augmented Bortz

2466

1   because Horowitz already includes the PTV and
2   Canada-only signals.
3   Q.   Did Mr. Horowitz conduct a survey
4   himself in the 2004-'05 proceeding?
5   A.   No.
6   Q.   How does Mr. Horowitz's 2010 to '13
7   survey compare to the 2004-'05 augmented Bortz
8   survey?
9   A.   Instead of having the kind of increase
10   we saw before of about 30 percent, here it's
11   approximately double for the PTV share.
12   Q.   Sticking to your direct testimony for
13   now, did you notice when you were preparing
14   this report any possible reasons that might
15   explain why on average cable operators
16   responding to the Horowitz survey valued Public
17   Television more highly than cable operators
18   responding to the Bortz survey, even after the
19   Bortz survey had been augmented?
20   A.   Yes. When I prepared the report and
21   saw that they were different, I was trying to,
22   you know, understand how that would happen.
23   And so I looked into the responses for -- that
24   is, who was in the respondent group for Bortz
25   and for Horowitz.

2467

1   And I saw that there were some big
2   cable systems that carried -- they were very
3   large; they carried -- in terms of royalty
4   payments. They carried -- and they carried
5   more Public Television signals than the
6   average. So they were -- they had a higher,
7   you know, percent of subscriber instances than
8   the average.
9   And they were not included in the
10   Bortz survey. And these particularly, I didn't
11   -- I didn't say the name of them in the -- you
12   know, I had a footnote in my report and pointed
13   to, you know, documents that I looked at, but
14   these were Verizon systems.
15   Q.   And we're going to come back to that
16   when we get to your rebuttal testimony later,
17   but let's now turn and talk about the
18   econometric regression analyses.
19   Whose testimony regarding regression
20   analyses did you consider in addressing changed
21   circumstances between 2004-'05 and 2010-'13?
22   A.   For the earlier period, I looked at
23   the regression from Dr. Waldfogel. And from
24   the later period, I looked at two regressions,
25   one from Dr. Crawford and one from Dr. Israel.

2468

1   Q.   So looking now at chart 5 from your
2   direct testimony, what does this chart show?
3   A.   On the left, it shows Dr. Waldfogel's
4   results in terms of the relative value that
5   came out of his econometric analysis. And for
6   PTV, it shows 6.8 percent.
7   So the -- and then in the -- in the
8   right, it shows the Crawford analysis for the
9   2010-'13 time period. Now, Crawford did two
10   analyses. This is the one that is most
11   comparable -- you know, comparable to
12   Waldfogel. He did a second that he preferred
13   but that wasn't too dissimilar, but it wasn't
14   comparable, so that's why I used this one.
15   And in this initial analysis of
16   Crawford, he found 18.8 percent of the relative
17   value for PTV, which is about almost triple
18   what Dr. Waldfogel found.
19   Q.   How did Dr. Crawford's analysis of the
20   marginal value of a minute of Public Television
21   programming compare with Dr. Waldfogel's
22   analysis?
23   A.   Dr. Waldfogel found an average -- that
24   the -- that an incremental minute of PTV
25   programming would be worth 4.4 cents -- no, 4.

2469

1   -- I say it in my report. I just don't want to
2   say the -- say it backward. I think it's 4 --
3   4.2 cents, sorry. And Dr. Crawford found that
4   it was 5.1 cents. So it went up, you know,
5   20 percent or so.
6   And so this -- this is showing more or
7   less directly that not only did the units go up
8   in terms of subscriber instances but the price
9   actually went up in terms of the value of an
10   incremental minute.
11   Now, the minutes went up more than the
12   subscriber instances, and that's why the value
13   was tripling and not just increasing by
14   30 percent and then another 20 percent.
15   Q.   Let's turn to chart 6. What does this
16   chart show?
17   A.   This compares the same Waldfogel
18   analysis with Dr. Israel's 2010 to '12
19   analysis, which Dr. Israel said was comparable
20   to Waldfogel.
21   Q.   And what are the results as to Public
22   Television here?
23   A.   Here Public Television, you know,
24   approximately doubled from 6.8 percent of
25   relative value to 13.5 percent.

2470

1   Q.   Let's turn now to the viewing studies.
2   JUDGE STRICKLER: Just before you
3   do -- counsel, excuse me.
4   I note that you explained through
5   chart 5 and chart 6 the comparisons of the two
6   econometric analyses. You don't favor -- in
7   your report, correct me if I'm wrong, you don't
8   favor one over the other as being more
9   probative; is that right?
10   THE WITNESS: That's right.
11   JUDGE STRICKLER: Thank you.
12   BY MR. DOVE:
13   Q.   So, Ms. McLaughlin, turning now to
14   viewing studies, whose testimony regarding
15   viewing studies did you consider in addressing
16   changed circumstances from 2004-'05 to
17   2010-'13?
18   A.   I looked at Mr. Lindstrom's study in
19   the earlier period and Dr. Gray's study in the
20   later period.
21   Q.   If you could turn to chart 7 of your
22   testimony. What does this chart show?
23   A.   This is showing relative viewing in
24   the two periods, and the PTV viewing, according
25   to these data, went up from 20 percent to

2471

1   33 percent.
2   Q.   And was --
3   A.   But the increase in viewing is not the
4   same as -- as the previous measures we were
5   talking about in value, but it's showing that
6   the increase in viewing was greater than the
7   increase in subscriber instances, suggesting
8   that the program became more popular with
9   consumers, and that might be why the value went
10   up -- also a reason why the value went up to
11   the cable operators. But it's not a value
12   measure itself.
13   Q.   All right. If we could turn now to
14   slide 12. And I just want to tie all this
15   together in looking at what is, I guess, chart
16   8 of your testimony.
17   And if you could just sort of walk us
18   through that bar by bar. What does this chart
19   8 demonstrate?
20   A.   All right. So here I'm looking at
21   percentage change between 2004-'5 and 2010-'13
22   in a variety of measures. First, I'm looking
23   at my units measure subscriber instances, and
24   that went up 32 percent, all right?
25   So then I wanted to see what about

2472

1   value? The augmented Bortz survey went up
2   31 percent, about the same. The other value
3   measures went up more. For Horowitz, it was a
4   109 percent increase. For Crawford,
5   176 percent. For Israel, 99 percent.
6   So there -- it's suggesting the
7   increase in value was greater than the increase
8   in subscriber instances in three of the four
9   value measures. And then it also shows that
10   viewing went up. You know, it also shows the
11   increase in viewing as well.
12   Q.   And then let's turn to Table 2 of your
13   testimony. What does this summary table show?
14   A.   This table shows that if you start
15   with the share that the Judges gave to -- of
16   the Basic Fund that the Judges gave to PTV in
17   2004-'05, which was 7.55 percent, and you
18   increased it by each of these measures, what
19   would happen to PTV's share of the Basic Fund
20   in 2010-'13.
21   So if you increased it by the
22   subscriber instances, it would increase
23   9.9 percent. That's the same as if you used
24   the augmented --
25   Q.   I'm sorry, it would increase to

2473

1   9.9 percent?
2   A.   To 9.9 percent. Yes, it increased the
3   by 32 percent. So from 7 and a half up to 9.9
4   is the 32 percent.
5   Q.   And this is at the bottom -- the
6   bottom row you're talking about, right?
7   A.   Yes. I calculated it year by year as
8   well.
9   Q.   So that's for subscriber instances.
10   Just going across the columns, what are your
11   conclusions with regard to what Public
12   Television's share of the Basic Fund for 2010
13   to '13 should be, based on those different
14   measures?
15   A.   Well, it should be at least
16   9.9 percent and I think greater than that
17   because most of the value measures were more
18   than that, but it would be 9.9 percent based on
19   augmented Bortz, 15.8 percent based on
20   Horowitz, 20.8 percent based on Crawford's
21   initial regression, and 15 percent by Israel's.
22   If you used the viewing measure, it would be
23   12.6 percent.
24   Q.   And just to recap, you know, why did
25   you look at changed circumstances for Public

2474

1   Television? I mean, why was that an approach
2   you thought was appropriate here?
3   A.   Because it has the most information in
4   it, of any of the approaches, it takes into
5   account what happened in the past. It allows
6   us to compare more things. So we can look at
7   subscriber instances -- the change in
8   subscriber instances, which isn't a measure by
9   itself of value, but it's indicative of one
10   part of the -- of the reason why the value
11   would go up, the -- the units part.
12   And we can look at the regressions
13   which started at a higher level than the Bortz
14   survey did or the augmented Bortz survey did in
15   2004-'5, so we can just look at the change and
16   not just at the level. We can say: Well, it's
17   higher before and now, you know, it's higher
18   but it's higher by a bigger amount.
19   We can look at viewing, which I don't
20   see as a measure of value itself, but we can
21   look at the change in viewing to see that there
22   was an increase in popularity in the
23   programming.
24   So I think it enables us to include
25   more information.

2475

1   Q.   And as part of this changed
2   circumstances approach, did you decide, you
3   know, that one particular methodology was
4   better than another? Was that part of what you
5   did?
6   A.   No, just that the -- that the change
7   -- I concluded that the change in value was at
8   least as great but probably greater than the
9   change in subscriber instances. So --
10   otherwise, I did not -- I didn't say, oh, we
11   should use, you know, this method or that.
12   Q.   Up until now, we've just been talking
13   about changed circumstances. Let's just talk
14   for a moment about other experts' analyses
15   which look at 2010 to '13 in isolation and do
16   not look specifically at changes from 2004-'05.
17   Did you assess how any of those
18   analyses compare with your assessment of
19   changed circumstances?
20   A.   Yes.
21   Q.   And are the results of that assessment
22   summarized here on Table 3?
23   A.   Yes.
24   Q.   What does this table show?
25   A.   So this table shows that if you ignore

2476

1   the past information and only look currently,
2   the augmented Bortz survey would suggest a PTV
3   share of the Basic Fund of 9.3 percent for the
4   period as a whole. The Horowitz survey,
5   14.9 percent. The Crawford preferred
6   regression -- here I'm using his preferred
7   because he prefers it, and I don't have to
8   compare with something else -- 19.7 percent.
9   And the Israel regression, 15.6 percent.
10   And, you know, these numbers are
11   similar, as you would expect, to changed
12   circumstances because if you look at changed
13   circumstances, that begins with the past and
14   moves to the present and tells you what the
15   present would be based on that change. And if
16   you just look at the present, that's going to
17   incorporate the change in it.
18   So, you know, it's not surprising
19   that, you know, they work out to be the same.
20   Not the same, but similar.
21   Q.   Now, I notice that the shares in this
22   table are of the Basic Fund. How did you
23   calculate Public Television's share of the --
24   of the -- well, put it this way: Why -- first
25   of all, why would you make these calculations

2477

1   in terms of the Basic Fund?
2   A.   So Public Television only receives a
3   share of the Basic Fund. But all of these
4   studies look at, as a percent of all royalties
5   from all funds, how they would divide the
6   relative value.
7   So that if the relative value is of
8   all royalties but you're only going to pay PTV
9   from the Basic Fund, you have to basically --
10   you know, you have to divide -- the answer is
11   -- by the Basic Fund's share of the total.
12   Q.   And so how -- how then in this case
13   did you calculate Public Television's share of
14   the Basic Fund?
15   A.   Well, I used the data from CDC that
16   showed how much money is in the Basic Fund and
17   the Syndex Fund and in the 3.75 Fund. And PTV
18   has about 86 -- I mean, I'm sorry -- the basic
19   fund has about --
20   Q.   We'll take that.
21   (Laughter.)
22   THE WITNESS: -- 86 percent of the
23   total.
24   BY MR. DOVE:
25   Q.   And did the Judges in the 2004-'05

2478

1   proceeding also do a similar calculation with
2   regard to the Basic Fund?
3   A.   Yes, they -- yes. I followed the same
4   method.
5   Q.   So let's come back now to something we
6   started talking about earlier with regard to
7   the Bortz survey. If we could -- if you could
8   turn in your notebook to Exhibit 3002 in your
9   binder.
10   And my question for you,
11   Ms. McLaughlin, is -- well, first, could you
12   examine this document and tell me whether this
13   is the written rebuttal testimony of you and
14   Dr. Blackburn of September 15th, 2017?
15   A.   Yes.
16   Q.   And did you and Dr. Blackburn
17   collaborate to prepare the testimony in
18   Exhibit 3002?
19   A.   Yes.
20   Q.   And do you have any corrections to
21   Exhibit 3002?
22   A.   No.
23   Q.   I believe you testified earlier that
24   you had noticed that several large cable
25   systems that carried Public Television stations

2479

1   had not actually responded to the Bortz survey,
2   even though they were in the eligible sample,
3   but did respond to the Horowitz survey. Is
4   that right?
5   A.   Yes.
6   Q.   And were you able to obtain data that
7   allowed you to analyze in a systematic way
8   whether the difference in actual participation
9   rates may have biased the Bortz survey results
10   with respect to Public Television programming?
11   A.   Yes. If you remember the first thing
12   we talked about was --
13   Q.   I guess if we can go to slide 16,
14   which is Table 1 from your Exhibit 3002, to the
15   extent that's helpful in explaining what you
16   did with respect to this issue.
17   A.   Right. We saw that PTV's share of
18   distant subscriber instances was about
19   15.8 percent in the universe. We saw that in
20   the beginning of my charts.
21   So I wanted to compare PTV's share of
22   distant subscriber instances in the universe to
23   what was in the Bortz sample and then the Bortz
24   augmented responses. And I chose this measure
25   because of what I noticed when I was first

2480

1 looking at it, that there were large systems
2 that were not only big royalty payers but
3 carried PTV more than that, you know,
4 15.8 percent average, you know, to a greater
5 extent.
6   So I did that and found that the
7 augmented sample of Bortz -- and, you know, of
8 course, I would use the augmented sample
9 because I'm comparing it to the whole universe.
10 The augmented sample was a little bit low, but,
11 you know, not too much lower in Bortz, about
12 5 percent over the whole time period. But the
13 augmented respondents were quite a bit lower.
14 They were more like PTV's share in 2004-'5.
15   So I thought that this suggested that
16 it's a possible reason for the difference for
17 the lower value of the Bortz -- augmented Bortz
18 survey compared to all the other measures of
19 value that didn't show a greater increase in
20 value than the subscriber instances might have
21 been due to just what happened with the -- with
22 the eligible respondents.
23   JUDGE STRICKLER: And with regard to
24 eligible respondents, did you say earlier this
25 morning that the missing eligible

2481

1 respondents -- that is, that did not respond to
2 the survey -- were Verizon systems?
3   THE WITNESS: Some of them were
4 Verizon, and I think that there were -- I think
5 there were only two Verizon systems that
6 responded to the Bortz survey in any year. And
7 I don't think those two carried PTV, those
8 particular systems.
9   And there were -- but there were --
10 but Verizon is quite a large percent. I think
11 Dr. Crawford has a figure of, in his testimony,
12 of how large in royalty paying that the Verizon
13 systems are, but it's something on the order of
14 14 percent, something like that, over
15 10 percent of all royalties come from Verizon.
16   So I didn't just look to see it was
17 Verizon. I tested it more generally because,
18 you know, I don't know that it was -- it was
19 just Verizon. I think -- but I do think that's
20 part of the problem.
21   JUDGE STRICKLER: And turning to the
22 Horowitz survey, was there also a problem of
23 Verizon not responding to that survey?
24   THE WITNESS: No, in fact, Verizon did
25 respond to the Horowitz survey. And since I

2482

1 was checking Bortz to see if they had a -- some
2 bias in their respondents, I checked Horowitz
3 to see, you know, if they had any on the same
4 measure, and Horowitz had a little more PTV
5 distant subscriber instances than the universe.
6   So Horowitz, you know, seemed to be
7 like more -- heavier on the people carrying a
8 lot of PTV, whereas -- and perhaps due to
9 having a lot of Verizon respondents' responses,
10 and Bortz seemed to be a little light on having
11 the people who were carrying PTV an average
12 amount.
13   JUDGE STRICKLER: So the point you're
14 making on Table 1 in your rebuttal testimony
15 applies only to the Bortz -- augmented Bortz
16 survey, rather than to the Horowitz survey?
17   THE WITNESS: Right. I address the
18 Horowitz survey later in the rebuttal report.
19 I didn't do a chart on it, but I just said
20 that -- I checked it, you know, if one is
21 under, maybe the other one is over. And, in
22 fact, I found that was the case, but the
23 Horowitz survey was not over on this measure by
24 as much as the Bortz survey was under.
25   JUDGE STRICKLER: Do you think the

2483

1 Horowitz survey was deficient -- was inaccurate
2 in any way because of this same phenomenon that
3 you're describing with regard to non-response
4 by Verizon and perhaps others?
5   THE WITNESS: I think it might have
6 been that they -- that the Horowitz survey had
7 more Verizon respondents than their
8 representation in the universe, but, in
9 general, forget about Verizon, just in terms of
10 people's carriage of PTV, they might have
11 gotten eligible respondents that were a little
12 heavier on the carriage.
13   JUDGE STRICKLER: Heavier than the
14 augmented Bortz or heavier than the universe?
15   THE WITNESS: Heavier than the
16 universe. Heavier than the universe, yes.
17   JUDGE STRICKLER: So it would
18 actually, to some extent, err in the other
19 direction?
20   THE WITNESS: Yes, exactly. And I
21 explain that on page 4 of the report. I say
22 that it was the Horowitz -- the higher carriage
23 was like 18 percent higher versus 22 percent
24 lower compared to the universe. In other
25 words, if I had put this whole chart in for the

2484

1   Horowitz study instead of a minus 22 in the
2   right-hand corner, it would have been a plus
3   18.
4   JUDGE STRICKLER: Thank you.
5   BY MR. DOVE:
6   Q.   Ms. McLaughlin, in his written
7   rebuttal testimony, Mr. Trautman states that
8   based on his analysis in his appendix table
9   A-5, participation bias does not explain the
10   lower value for Public Television in the Bortz
11   surveys.
12   Do you agree with that?
13   A.   No.
14   Q.   And why not?
15   A.   Well, he used a different measure.
16   Not that it's not a valid measure, but it
17   didn't -- didn't incorporate everything. So he
18   used for his survey, how -- how many of the
19   people in his survey who carried PTV at all
20   compared to the universe -- how many in the
21   universe carried PTV at all?
22   And he said they were about the same.
23   Now, he didn't include the PTV-onlys. They had
24   to carry PTV and something else, you know, but
25   I'm not worried about that problem as long as

2485

1   you use the augmented Bortz.
2   So -- but what I found, it wasn't just
3   PTV carriage that I was looking at; it was the
4   amount of PTV carriage and thinking that since
5   the amount of PTV carriage went up and the
6   values generally went up, and these -- from the
7   other studies, and so there might be a bias
8   here because the Bortz study didn't have the
9   same amount of PTV carriage among the people
10   who did carry PTV.
11   Q.   Mr. Trautman also states that Public
12   Television's share in the Horowitz survey is
13   inflated by what he calls an outlier MSO
14   respondent.
15   Do you agree that the respondent
16   identified by Mr. Trautman is an outlier that
17   should be removed?
18   A.   No.
19   Q.   And why not?
20   A.   We can give this outlier a name. It's
21   AT&T. AT&T is a large MSO. They account for
22   about 10 percent of all the royalty payments.
23   The survey is supposed to be
24   representative of the people who have -- who
25   have royalty payments. You wouldn't want to

2486

1   throw out somebody who said 10 percent unless
2   you had a reason to believe their answer was
3   wrong for them, to start with.
4   And there is no reason to believe that
5   their answer was wrong for them that I've seen.
6   Their -- they -- the answers that they give to
7   the value of PTV when they do carry it, they
8   don't carry it in every one of their systems,
9   but the answer they give is higher than many
10   other people, but not the highest, not the --
11   not that there's nobody who gives a value.
12   It's just that they are a lot of them. And so
13   they're getting a lot of weight, which they
14   should, because they pay a lot of royalties.
15   This is not the case of I do a sample
16   of 100 people and I'm going to project it to
17   the universe of the country. And so if one
18   person is so different from the rest, I think
19   that it might not -- it might influence our
20   projection in a way that wouldn't be valid,
21   that wouldn't be true, maybe it was a mistake
22   on their part.
23   We don't -- there is no indication
24   this is a mistake on the part of the AT&T
25   systems. They answer similarly from one year

2487

1   to the next. Sometimes the same; sometimes
2   not. In 2010, they were different.
3   But they -- and not only that, it's
4   not like they are one person who is
5   representing, you know, 100,000 people in the
6   universe. They are about 10 percent of the
7   royalty paying. And in the Horowitz survey,
8   they're representing about 14 percent of the
9   value of the respondents.
10   So they're only standing in for, you
11   know, somebody who is -- themselves and
12   somebody that's half the size of themselves.
13   Q.   Didn't Mr. Trautman say that if the
14   responses of one respondent were removed from
15   the Horowitz results each year, the 2010-'13
16   average Horowitz PTV allocation would decline
17   by almost 5 percentage points?
18   A.   He said that.
19   Q.   And what's your response to that?
20   A.   You know, it's a statistic that I saw
21   how he created, and it's not -- you know, he
22   didn't make it up. But it's not the relevant
23   statistic for this survey.
24   This is a weighted survey. His
25   5 percent did not include any weights. If we

2488

1   removed the AT&T responses, all of them -- you
2   can't just remove the ones that say PTV, right?
3   If you remove all the AT&T responses from the
4   Horowitz survey, the survey percentage would go
5   down for PTV but it would go down by about 2
6   percentage points.
7   Q.   Thank you.
8   MR. DOVE: I have no further
9   questions.
10   JUDGE BARNETT: Cross-examination?
11   MR. GARRETT: Yes, ma'am.
12   JUDGE BARNETT: Mr. Garrett.
13   CROSS-EXAMINATION
14   BY MR. GARRETT:
15   Q.   Good morning, Ms. McLaughlin.
16   A.   Good morning, Mr. Garrett.
17   Q.   I'm Bob Garrett on behalf of the Joint
18   Sports Claimants. Good to see you again.
19   A.   You too.
20   MR. GARRETT: Your Honor, a couple of
21   housekeeping matters before we begin here.
22   We have filed a number of exhibits
23   that we plan to use with Ms. McLaughlin. I
24   canvassed the parties. I think we are in
25   agreement on all but one of them. And for the

2489

1   one that we don't have agreement, I will just
2   simply not move the admission of.
3   JUDGE BARNETT: All right.
4   MR. GARRETT: But with the Judges'
5   permission, I'd like to give Ms. McLaughlin a
6   binder with the exhibits, as well as other
7   material that we're going to be referring to
8   today. And then I'll move for the admission.
9   JUDGE BARNETT: Thank you. We just
10   need to be sure the numbers get on the record.
11   MR. GARRETT: Yes, ma'am. May I
12   approach the witness?
13   JUDGE BARNETT: Yes.
14   MR. GARRETT: Your Honor, the exhibits
15   are Numbers 1096 through 1104 inclusive. And I
16   believe we have no objections to any of those
17   exhibits with the exception of 1102.
18   JUDGE BARNETT: So you're not offering
19   1102?
20   MR. GARRETT: I will not offer 1102.
21   I will offer the others and ask that you admit
22   them.
23   JUDGE BARNETT: Thank you. Then
24   Exhibits 1096 through 1101, inclusive, and 1103
25   through 1104 inclusive are admitted.

2490

1   (Exhibit Numbers 1096 through 1101,
2   1003, and 1004 were marked and received into
3   evidence.)
4   JUDGE BARNETT: And are you
5   withdrawing 1102 or do you want --
6   MR. GARRETT: I think I will use it
7   with her to see what I can get out of it.
8   JUDGE BARNETT: Far be it for me --
9   MR. DOVE: We're going to object to it
10   when it happens.
11   JUDGE BARNETT: Oh, I would be
12   disappointed if you didn't.
13   Go ahead, Mr. Garrett.
14   MR. GARRETT: All right. Thank you,
15   Your Honor.
16   BY MR. GARRETT:
17   Q.   So, Ms. McLaughlin, what I've given
18   you are two binders. One contains -- in the
19   smaller one are the exhibits that I just
20   referenced. And at various points during the
21   morning here, we'll refer to some of those
22   exhibits.
23   The other contains some of the
24   material that you had in the binder from
25   Mr. Dove, your testimony, as well as the

2491

1   testimony of some others that we will refer to
2   today such as the Bortz report, as well as
3   possibly some of the prior determinations of
4   the Judges and their predecessors in these
5   proceedings. Okay?
6   A.   Okay.
7   Q.   Let me -- before I begin here, let me
8   just go back to some of your answers to the
9   final group of questions here. You identified
10   Verizon systems as those that were not included
11   in the Bortz reports, correct?
12   A.   Well, I don't think I said they were
13   not included at all. I think there might have
14   been two, right?
15   Q.   Right. There were two respondents --
16   A.   Right.
17   Q.   -- of Verizon here. But they were
18   respondents from Verizon in the Horowitz
19   report, correct?
20   A.   Yes, there were.
21   Q.   Did you check to see what the average
22   allocation those Verizon systems gave for
23   Public Television in the Horowitz report?
24   A.   I did look at that.
25   Q.   And do you know how that average

2492

1   allocation compared to the average allocation
2   given by other Horowitz respondents who had
3   Public Television programming?
4   A.   It was higher in some cases and, you
5   know, lower in others. I mean --
6   Q.   I'm looking for just an overall
7   average.
8   A. . Oh. To compute the overall average?
9   I did not compare Verizon's overall average
10   with the Horowitz respondents.
11   Q.   Is it possible that the overall
12   average of those Verizon respondents was lower
13   than it was for the other Horowitz respondents?
14   A.   You know, I remember that the   .
15   comparison I did, I compared -- I looked at
16   their responses in three of the years. I have
17   a lot of trouble with the 2010 data from the
18   Horowitz report. I mean, trying to match up
19   who was who. So I didn't look at that.
20   But in the other years, they were
21   higher than the numbers that were in the Bortz
22   report. So I saw that they would have -- they
23   would have -- they would have, on average,
24   raised the Bortz PTV response if they had been
25   included.

2493

1   Q.   Do you know what the average
2   allocation was for Public Television in the
3   Bortz reports in the years in question?
4   A.   Well, in the augmented Bortz, I have
5   it, if I can look back at the testimony.
6   Q.   Certainly.
7   A.   You know, I don't think I have the
8   year by -- I don't think I have the year by
9   year in my report. So -- but the -- I just had
10   the overall. So I don't know that I could -- I
11   could say what the average was, but I -- for
12   2010 to '13, it was 6.1 to 6.2 percent. So in
13   the years that I looked at, I know that it was
14   -- they were higher than 6.1 to 6.2 percent.
15   Q.   Okay. And you also referenced the
16   AT&T respondents in the -- in the Horowitz
17   surveys, correct?
18   A.   Yes.
19   Q.   And that was a single respondent who
20   answered on behalf of 60 different systems,
21   correct?
22   A.   You know, I know that Mr. Trautman
23   said that. I did not check that. I don't know
24   one way or the other. But I have no reason to
25   disbelieve it, but I didn't check it.

2494

1   Q.   Well, the information is in the
2   Horowitz report, isn't it?
3   A.   I don't think it's in his report -- it
4   may be in his report, but I don't remember it
5   being in the report. It might be in the
6   backup.
7   Q.   Okay. So let me just kind of go back
8   to the beginning here. When were you first
9   retained by the Public Television Claimants?
10   A.   I'm not sure, but I think it might
11   have been in 2014.
12   Q.   Okay. And your assignment was to
13   determine the relative market value of Public
14   Television programming during 2010 through '13
15   on distant signals?
16   A.   Yes.
17   Q.   Okay. And in order to make that
18   determination, is the only thing that you
19   looked at the change in the distant subscriber
20   instances, initially?
21   A.   Initially -- well, no. I looked at
22   the change in other measures, but only in other
23   measures that were available from CDC. So, you
24   know, I looked at the change, you know, in --
25   other kinds of measures that you could get from

2495

1   CDC, but not like in -- in DSEs or in fees gen
2   or something like that, so I looked at all of
3   those things, but not in -- but I didn't look
4   beyond that initially.
5   Q.   Okay. And so you filed your initial
6   testimony here in December of 2016, correct?
7   A.   Yes.
8   Q.   And in that testimony, the only
9   analysis, the only study that you presented was
10   your change in distant subscriber instances
11   study, correct?
12   A.   Yes.
13   Q.   And that was the one that you showed a
14   9.9 percent increase in the relative market
15   value of Public Television programming,
16   correct?
17   A.   It was the 32 percent increase but
18   would yield a 9.9 percent share of relative
19   value.
20   Q.   All right. And then a couple of
21   months later after you had a chance to look at
22   the studies of all the other parties, you filed
23   amended testimony, correct?
24   A.   Yes.
25   Q.   And --

2496

1   A.   That's the testimony we were talking
2 about.
3   Q.   That's Exhibit 3 --
4   A.   Right.
5   Q.   -- 3012 that we were discussing this
6 morning, correct?
7   A.   Yes.
8   Q.   All right. And so what you did in
9 that study was to -- I'm sorry, in that
10 testimony was to review the studies that had
11 been put in by the other parties, correct?
12   A.   Yes.
13   Q.   And based upon the studies put in by
14 all the other parties, you then came up with a
15 range of 9.9 percent to, what was it,
16 20.6 percent; is that correct?
17   A.   Yes.
18   Q.   And within that range, do you have an
19 opinion as to what the fair market value of --
20 relative fair market value of Public Television
21 programming is?
22   A.   My -- I don't have a specific number.
23 I just have that it should be greater than the
24 9.9 percent based on the fact that three of the
25 four value studies showed that it was higher,

2497

1 that the value increased to a greater extent,
2 and one of the studies showed the price
3 increased of a minute of PTV programming.
4   Q.   So, basically, what you've done here
5 is you've looked at the bottom-line numbers for
6 Public Television in the studies put on by all
7 the other parties here, and just showed what
8 that value is for Public Television, correct?
9   A.   Well, I did study -- I did -- in my
10 chart 3, I put in what the -- I put in what
11 values they said, four of the people said, the
12 two survey people and the two regression
13 people, but I looked at the change from '04-'05
14 to 2010-'13 in these other studies by comparing
15 them back to the Waldfogel and the augmented
16 Bortz in that time -- earlier time period and
17 the viewing of Lindstrom.
18   Q.   But the range that you have here,
19 between 9.9 percent and the 20.6 percent here,
20 that range is established solely by the studies
21 of the other parties plus your distant
22 subscriber instances analysis, correct?
23   A.   If you count the -- in the sourcing
24 for that, you would have to count the Waldfogel
25 and the earlier augmented Bortz, as well as

2498

1 the -- you know, the determination by the
2 Judges.
3   Q.   All right. But these are all studies
4 that have been done by other parties?
5   A.   Yes.
6   Q.   And not by you?
7   A.   Yes, yes, exactly. Exactly.
8   Q.   All right. And when you got the
9 evidence or the studies from all the other
10 parties, you did your augmentation of Bortz,
11 correct?
12   A.   Yes.
13   Q.   And the number that you got when you
14 did your Bortz augmentation, was it 9.3 to
15 9.9 percent? Is that correct?
16   A.   You're saying the number that you're
17 referring to would be what the -- what the
18 relative value of PTV would be in 2010-'13,
19 9.9 percent based on the change the
20 circumstances method, using just -- using
21 augmented Bortz, and 9.3 percent just looking
22 at the 2010-'13 numbers, yes.
23   Q.   All right. So very close to what it
24 was that you first came up with your distant
25 subscriber instances analysis?

2499

1   A.   Yes, showing the value increased the
2 same as the subscribers.
3   Q.   Okay. Let me just turn -- you talked
4 about your use of the CDC data. You're quite
5 familiar with CDC, I take it.
6   A.   I've used the CDC data before.
7   Q.   Okay. So let me pull up Exhibit 1096,
8 John.
9   Ms. McLaughlin, this is a spreadsheet
10 that was produced by your counsel in discovery
11 here. And it was represented that it underlies
12 the calculations that you did in the distant
13 subscriber instances analysis?
14   A.   Yes.
15   Q.   Okay.
16   JUDGE BARNETT: Mr. Garrett, this is
17 marked as a restricted document.
18   MR. GARRETT: Yeah, I'll -- I'm sorry,
19 Your Honor. This was another thing we had
20 discussed. I think it's restricted -- well,
21 first of all, I don't believe the Public
22 Television Claimants have any objection to
23 keeping the room open here while it's
24 restricted.
25   And I think it's restricted here

2500

1 because this was part of a larger database that
2 CDC has, and they don't want the entire
3 database out in the public domain here.
4   JUDGE BARNETT: Well, CDC is not here
5 to tell us that. If there is anyone in the
6 room who is not -- has not signed a
7 nondisclosure agreement or who is not privy to
8 this information, could you please wait outside
9 while we discuss this document.
10   (Whereupon, the trial proceeded in
11 confidential session.)
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2531

1   Q.   So a Public Television station can
2 become a must carry on a particular cable
3 system in certain areas and the cable system
4 might branch out in other areas where it now
5 becomes a distant signal, correct?
6   A.   Well, if they carried it, it would be
7 a distant signal in other areas, yes.
8   Q.   Okay. And if they carried in those
9 other areas here, they might be carrying them
10 for reasons other than the fact that they
11 value, that is, that the cable operator values
12 the signal, correct?
13   A.   They might be carrying -- I think I
14 said in the testimony that you were pointing me
15 to before that it might -- they might want to
16 just have uniform carriage throughout and, you
17 know, that they are devoting a signal, you
18 know, they have to pay a price, and they --
19 both -- both in the signal, but especially this
20 would be the case of a system that was
21 configured so that it would, you know, would
22 have one headend.
23   It would, you know, so it would be
24 costly for them to do things differently,
25 probably not -- that probably wouldn't apply to

2530

1   O P E N   S E S S I O N
2 BY MR. GARRETT:
3   Q.   Ms. McLaughlin, right before the break
4 we were talking about partially distant
5 signals. Do you recall?
6   A.   Yes.
7   Q.   And a signal -- a Public Television
8 station as a local signal is eligible for the
9 must-carry rules, correct?
10   A.   The local would be eligible, yes.
11   Q.   So you're familiar with the must-carry
12 rules?
13   A.   I'm not familiar with the details of
14 it, but I know that there are must-carry rules
15 and that they are -- that they apply to Public
16 Television.
17   Q.   So could a Public Television station
18 go to a cable system, say, look, I'm a local
19 Public Television station and under the FCC
20 rules you must carry me, correct?
21   A.   For the primary signal, I believe that
22 that's true.
23   Q.   You are absolutely right. It does not
24 apply to the multi-cast signals, correct?
25   A.   Right.

2532

1 some of the very large systems that have
2 multiple headends and carry different stations
3 in different parts, both locally and distant.
4   Q.   Okay. So in your 2000 to 2003
5 testimony, which was that Exhibit 3003, you
6 state there on page 3 --
7   A.   This is 3003?
8   Q.   Yes.
9   A.   Um-hum.
10   Q.   Page 3.
11   A.   Yes.
12   Q.   In that top paragraph, I think it is
13 the penultimate sentence. "For example." Do
14 you see that?
15   A.   Yes.
16   Q.   It says, "may retransmit one partially
17 distant signal only for the purpose of carrying
18 the same broadcast stations and other channels
19 throughout its system in order to save on
20 marketing and technical cost."
21   A.   Yes, I see that.
22   Q.   And that's what you are referring to?
23   A.   Yes, exactly.
24   Q.   Did you do any -- look at any CDC data
25 that show how often -- well, let me, before I

2533

1 do that, so you have, when we see in your
2 distant subscriber instance analysis, we see
3 that a signal has been carried to one
4 particular subscriber.
5   We can't tell from that alone whether
6 the cable system really valued the distant
7 signal enough to bring it to these other areas
8 or whether it is doing it for these other --
9 other --
10   A.   Right, it's not that it has no value.
11 It has the -- it has the market, you know, it
12 has the value that it makes it easier to market
13 the system.
14   Q.   Okay.
15   A.   I was just giving it as an example.
16 So I don't mean it has no value. I am just
17 saying that it could be -- it could be that
18 they want the signal just so everything is the
19 same throughout.
20   My, you know, my general experience is
21 that larger systems don't have everything the
22 same throughout, but, you know, that they might
23 -- they have -- they might have the same --
24 some the same and some different.
25   Q.   Okay. So did you look at any CDC data

2534

1 to get a sense of how often Public Television
2 signals are carried, that is, Public Television
3 distant signals are carried as partially
4 distant signals?
5   A.   I didn't actually think partially
6 distant applied now. I thought it was only
7 subscriber groups.
8   But if that's what you -- is that what
9 you mean by partially distant or as a -- as a
10 percent of the system because the subscriber
11 group gets it?
12   Q.   You looked at the number of distant
13 subscriber instances in the analysis that you
14 did, correct?
15   A.   Right.
16   Q.   And some of those distant subscriber
17 instances are going to be -- are going to
18 reflect a signal that is distant to some
19 subscribers of a system and local to others.
20 Correct?
21   A.   That's right.
22   Q.   And the reason they might be local to
23 the system is because that system received a
24 must-carry request from the Public Television
25 station?

2535

1   A.   Or they just want to -- the local,
2 they just want to carry the local public
3 station, whatever it is.
4   Q.   Sure. They might want to carry the
5 local Public Television station. But Public
6 Television stations also have the option of
7 existing on carriage in a particular area?
8   A.   I think all stations, local stations
9 have the option of insisting on carriage. No?
10   Q.   Well, for commercial stations, most of
11 them don't insist upon a must carry. They opt
12 for retransmission consent, don't they?
13   A.   I didn't say what -- whether they
14 opted for it or not. I just said that they
15 have the, you know, you could either pay me or
16 I could demand that I be carried.
17   Q.   Okay. Would it surprise you to learn
18 that during the period 2010 through '13, that
19 somewhere between 60 and 80 percent of the
20 distant subscriber instances that you looked at
21 there reflected carriage of partially distant
22 signals?
23   A.   I don't know that that's true or not,
24 but it would not surprise me. I know that it
25 is very often the case that systems are only

2536

1 carried -- if by that you mean in a -- in a
2 part of the area, so you have a system and
3 5 percent of the area is getting -- 5 percent
4 of the subscribers, in other words, are getting
5 this station as a distant signal.
6   Q.   And that would be a partially distant
7 signal in that case?
8   A.   Under that definition, it wouldn't
9 surprise me. I don't know that the number is
10 correct or not.
11   Q.   Okay. Let's go to your current
12 testimony here which is 3012. Go to page 9.
13 We will put it up on the screen, but if you
14 want the, you know.
15   A.   I actually like reading it on a piece
16 of paper better.
17   Q.   Fair enough.
18   A.   Okay. And what page?
19   Q.   9, note 16.
20   A.   Okay.
21   Q.   So this is the -- actually I guess you
22 referred to this footnote earlier in your
23 testimony this morning.
24   A.   Yes.
25   Q.   Talking about the growth in the use of

2537

1   multi-cast signals.
2   A.   Yes.
3   Q.   And you say there, "of these
4   multi-cast signals, most are PTV multi-cast
5   signals. Out of the 14 million total
6   multi-cast subscriber instances per half year
7   period, 87 percent"?
8   A.   Right.
9   Q.   Are you saying that there were --
10   A.   These are distant. We're talking
11   about distant. If I didn't say it in the
12   footnote, I was talking about distant
13   multi-cast.
14   Q.   Are you saying that there are 14.9
15   million distant multi-cast subscriber instances
16   for each accounting period during 2010 through
17   '13?
18   A.   On average, yes.
19   Q.   Okay. Let me -- let's just go to
20   Exhibit --
21   A.   Well, maybe I -- maybe -- did I mean
22   total or average? I can't -- I can't tell just
23   reading it. It might have been total.
24   Q.   Let's go to the next exhibit just to
25   clarify this here, which is 1100. Do you

2538

1   recognize Exhibit 1100?
2   A.   Yes.
3   Q.   Can you tell us what that is?
4   A.   That is the total distant -- that is
5   total distant multi-cast subscriber instances.
6   Q.   Now, if we go to the far right column
7   under Total --
8   A.   Right.
9   Q.   -- we see there the total number of
10   multi-cast --
11   A.   Yeah, so it shows that the 14 million
12   is the -- is the total of all the accounting,
13   you know, adding up all the accounting periods,
14   yes.
15   Q.   Right.
16   A.   But the point was to get some way to
17   get the 87, you know, it would -- the
18   87 percent was the important number in the --
19   in the footnote.
20   Q.   Right. And so if I can go to slide 5,
21   Geoff. Now, just so the record is clear here,
22   in 2010-'13, based upon the Exhibit 1100, there
23   are about 1.6 million PTV multi-cast distant
24   subscriber instances on average, correct?
25   A.   That looks right because that's the 11

2539

1   million number that we looked at before that I
2   mentioned it in my testimony, right, and I know
3   that about half of the increase between '04-'05
4   and 2010-'13 was due to increased carriage of
5   the -- or carriage of the -- carriage of the
6   distant multi-cast just didn't -- wasn't
7   carried at all before.
8   Q.   Right.
9   A.   Didn't exist.
10   Q.   Right. But looking over the entire
11   period of the multi-cast, distant subscriber
12   instances for PTV amounted to about 14 percent
13   of your total distant subscriber instances,
14   correct?
15   A.   Yes.
16   Q.   Okay.
17   A.   Half of the growth and 14 percent of
18   the total.
19   Q.   All right. Let me go back here again
20   to this hypothetical marketplace. If we had
21   the hypothetical marketplace for distant
22   signals in 2010 through '13, would the
23   must-carry rules be in place or would they be
24   eliminated, in your opinion?
25   A.   I guess I'm -- let me reread the

2540

1   testimony that we're referring to because, you
2   know, it could be any hypothetical marketplace.
3   Q.   Sure.
4   A.   You are talking about hypothetical
5   negotiations in terms of setting the -- in
6   terms of coming up with relative value, if we
7   -- if we were -- if we were trying to do this
8   in a hypothetical marketplace, we would -- we
9   would have people who were cable operators
10   bargaining with television, local television
11   stations about importing them.
12   Q.   And the stations would be negotiating
13   with the copyright owners of the television
14   programming, correct?
15   A.   Right. So -- right. But it -- right,
16   at this point it would be -- I was picturing it
17   as being the stations, right, the stations on
18   behalf of the copyright owners bargaining with
19   the cable operators.
20   So they would -- all right. Now I
21   have the -- now I have the hypothetical in
22   mind. I'm sorry. Could you repeat the
23   question?
24   Q.   Well, in that hypothetical marketplace
25   that you're envisioning, would the must-carry

2541

1 rules be in place? Would local Public
2 Television stations have the right to insist
3 upon carriage?
4   A.   Well, and local other stations would
5 have the right to insist on carriage.
6   Q.   So those regulations would remain in
7 place in the hypothetical marketplace that you
8 envision?
9   A.   Because -- yes, because without that,
10 it wouldn't be the same market, you know, it
11 wouldn't -- it wouldn't be the same, yes.
12   Q.   Would the cable operators -- you know
13 under the current law cable operators cannot
14 substitute advertising on broadcast signals,
15 correct?
16   A.   Correct.
17   Q.   In the hypothetical marketplace, would
18 they be able to substitute advertising?
19   A.   No, because otherwise it wouldn't be
20 the same marketplace.
21   Q.   It wouldn't be the same marketplace as
22 which?
23   A.   As what we're -- as what we care
24 about, the distant retransmission of whole
25 signals.

2542

1   Q.   Right.
2   JUDGE STRICKLER: You wouldn't
3 hypothesize a change in that regard since you
4 are constructing a hypothetical market?
5   THE WITNESS: Well, well, we could,
6 but then it wouldn't help us figure out what
7 the price -- what the price would be for the
8 marketplace that we are looking at.
9   JUDGE STRICKLER: I want to go back to
10 something, a little more of your answer, it
11 sparked a more general question.
12   You said that in this hypothetical
13 marketplace you conceive of the stations
14 negotiating, I think you said, on behalf of the
15 copyright owners?
16   THE WITNESS: Yes.
17   JUDGE STRICKLER: What is the
18 incentive, I mean, marketplace negotiations
19 occur because there is incentives to maximize
20 something, profits, revenues, minimize costs,
21 what have you.
22   THE WITNESS: Um-hum.
23   JUDGE STRICKLER: What is the
24 incentive in this hypothetical marketplace for
25 a station to negotiate on behalf of the

2543

1 copyright owners to get higher royalties if
2 none of that is going into the pockets of the
3 station itself? Why are they a faithful agent
4 in that regard?
5   THE WITNESS: Oh, well, usually the
6 station would have some of its own programming
7 as well as some programming that it had bought.
8   You know, for example, the, you know,
9 the news programming on a -- on a local
10 commercial station, say, would be done by
11 itself.
12   And I think that would be generally
13 true of television stations, that some of the
14 programming is theirs and some of the
15 programming they purchased from others.
16   JUDGE STRICKLER: So that's the hook
17 that gives them the same incentive as the other
18 copyright owners, was programs are bundled
19 together on the station?
20   THE WITNESS: Right. And sometimes
21 they would be in competing -- in competing --
22 it could be in competing with other stations.
23 It would depend on the type of programming and
24 how -- but this -- this is the way I was
25 envisioning the hypothetical market being.

2544

1   JUDGE STRICKLER: Thank you.
2 BY MR. GARRETT:
3   Q.   So going back to inserting
4 advertising, your view would be that in a
5 hypothetical marketplace that you envision ads
6 would not be able to be inserted by cable
7 operators?
8   A.   Well, not if we wanted to see what
9 would happen in a -- in other words, the reason
10 for using the hypothetical is to see how to --
11 how to distribute funds that are collected in
12 the current marketplace.
13   So we would want it to be similar to
14 the current marketplace.
15   Q.   In the current marketplace there is a
16 prohibition on substituting ads?
17   A.   I think so.
18   Q.   Assume for a moment that it was
19 changed so that you could now substitute ads.
20   A.   Okay.
21   Q.   With that assumption, would you be
22 able to substitute for infomercials, which
23 essentially are program-length commercials?
24   A.   I don't know. It's your hypothetical.
25   (Laughter.)

2545

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1   BY MR. GARRETT:
2       Q.    Well, I have ideas, but they don't let
3   me testify here.
4             All right.  So you don't have an
5   opinion on whether --
6       A.    No.
7       Q.    Because you just don't think that you
8   could substitute?
9       A.    Well, no, I'm sure -- I'm sure a
10  different marketplace could happen, but it
11  wouldn't -- it is not really of interest here,
12  I don't think.
13      Q.    Right.  Because the royalties that
14  have been paid for 2010 through 2013 were paid
15  by cable systems who could not substitute
16  advertising?
17      A.    That's why I said that, yes.
18      Q.    Okay.  So let me ask you this
19  hypothetical here:  Assume that there was
20  absolutely conclusive evidence to you that
21  during 2010 to 2013, that program category A
22  had a relative marketplace value of 50 percent.
23  Are you with me?
24      A.    Um-hum.
25      Q.    Okay.  And assume that there is also
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2546

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1   conclusive evidence that in a marketplace --
2   I'm sorry, I have to do this again because I
3   have now forgotten what I just said.
4       A.    I wrote it down.
5             (Laughter.)
6   BY MR. GARRETT:
7       Q.    Would you ask the question?
8       A.    A had 50 percent.
9       Q.    A had 50 percent in a marketplace, the
10  hypothetical marketplace where you could
11  substitute advertising.  Got that?
12      A.    Um-hum.
13      Q.    But there was also conclusive evidence
14  that in a marketplace where you can't
15  substitute advertising, which is the
16  marketplace we're actually dealing with, the
17  relative market value was 25 percent.  Have you
18  got that?
19      A.    Um-hum.
20      Q.    So in your hypothetical marketplace,
21  where do you set the value?  Is that at
22  50 percent or 25 percent?
23      A.    If we're trying to apply it to the
24  situation that we care about here, we would use
25  where it had -- where A's value relative to the
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2547

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1   other people was 25 percent and where you
2   couldn't substitute advertising.
3       Q.    Okay.  Thank you.
4             Oh, in this hypothetical marketplace
5   that you envisioned, would the syndicated
6   exclusivity rules still be operative?
7       A.    You know, I really haven't given a lot
8   of thought to that.  I see that the syndicated
9   exclusivity doesn't seem to amount to a very
10  big part of the royalty pool, .01 percent.
11            So I didn't, I mean, I just don't -- I
12  don't know that it makes a difference.  Perhaps
13  it does, and perhaps that's why.  It is so
14  little because there is a rule and nobody wants
15  to pay, I don't know, but I haven't thought
16  about it.
17      Q.    All right.  I wasn't really referring
18  to the Syndex surcharge.  I was referring to
19  the FCC syndicated exclusivity rules
20  themselves, as to whether or not those rules
21  would be operative in the hypothetical
22  marketplace that you envision, or if you
23  haven't thought about it, that's fine.
24      A.    I haven't thought about it.
25      Q.    Okay.  All right.
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2548

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1             Now, let me go to page 18 of your
2   current written direct testimony, which is
3   3012.  And this is where you discussed the
4   regression analyses presented by Drs. Crawford
5   and Dr. Israel.
6       A.    Waldfogel and Crawford.
7       Q.    I'm sorry, here it's Waldfogel and
8   Crawford.  And if I switch over here to page 25
9   of your testimony.
10      A.    Yes.
11      Q.    You see there in Table 3, the Crawford
12  regression, that's the one that gives you
13  19.7 percent, do you see that?
14      A.    Yes.
15      Q.    And that's what we talked about
16  earlier.  You also have a way of getting it to
17  20.6 percent, too, correct?
18      A.    Yeah, if you look at -- if you look at
19  my footnote 34 on page 18, I explain that in
20  the -- in the 2010 to 2013 period on that chart
21  that we're -- that comes next, the
22  Waldfogel/Crawford chart, that I used
23  Dr. Crawford's initial estimate which doesn't
24  adjust for duplicative programming because
25  that's comparable to Waldfogel, and -- but to
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2549

1   make, you know, to make it comparable.
2   But I also, you know, explained that
3   Crawford in the -- in the footnote above I say
4   that Crawford also supplied his preferred
5   estimate, which accounted for duplicative
6   programming, and the PTV share by this measure
7   is 17.0 percent instead of 18.8.
8   Q.   Okay. So a difference of almost 2
9   percentage points depending on which Crawford
10 analysis?
11   A.   Yes, exactly, his preferred regression
12 is the other one. But I couldn't use that in
13 the chart because it wasn't the same, you know.
14   Q.   All right. But in either case this is
15 what would give Public Television the highest
16 relative market value, correct?
17   A.   Of the different measures that I show,
18 yes.
19   Q.   Okay. Let me go back to page 18 of
20 that testimony.
21   A.   Yes.
22   Q.   And this is where you note, again, it
23 is the penultimate sentence of that paragraph,
24 "the value of an additional distant minute of
25 Public Television programming."

2551

1   A.   Right. And slightly below that of
2   additional Program Suppliers, right.
3   Q.   Actually very close to the Program
4   Suppliers' minutes here.
5   A.   Right. PTV has a lot of minutes.
6   Q.   Yeah.
7   A.   The sports -- you had -- you had a
8   graph up before that showed 87 percent of
9   subscribers get WGN.
10   Q.   Yes.
11   A.   But WGN has -- a lot of the
12 programming on WGN is not compensable. So that
13 accounts for why the sports could have a big
14 value for the -- for a marginal, big marginal
15 value for an extra minute, but it doesn't have
16 that many minutes.
17   And so when they multiply it out, even
18 having a much higher value, when you multiply
19 it by the minutes, it -- the percent -- we're
20 not looking at the percents here but I'm just
21 trying to explain how you could come up with
22 something that has a PTV, a price for an
23 additional minute of 5 cents, which seems kind
24 of low on this, and yet that be 20 percent of
25 the 18, you know, 18.8 percent of the value.

2550

1   A.   Yes, I see that.
2   Q.   You said it went up from 4.2 cents to
3   5.1 cents.
4   A.   Yes.
5   Q.   Okay. And so how did that additional
6   minute of Public Television programming compare
7   to the other minutes of programming of the
8   different categories; do you recall?
9   A.   You mean, what was the -- what was the
10 cents for the units?
11   Q.   Well, let me just skip here to slide
12 6. And you can check, but we have simply taken
13 the -- well, you see there the PTV role?
14   A.   Yes.
15   Q.   That's your 5.4 cents?
16   A.   Right. And you are showing the other
17 -- the other cents, right?
18   Q.   Exactly. Taken straight out of
19 Crawford there.
20   A.   Right.
21   Q.   So the value of that additional minute
22 according to Crawford --
23   A.   Right.
24   Q.   -- is just slightly above that of an
25 additional devotional minute, correct?

2552

1   So the reason is because you multiply
2   the price times the minutes to get the --
3   Q.   Understood. But the 5, the low 5.4
4   cents might also reflect other factors, like
5   availability of a lot of local -- a lot of
6   Public Television programming available on a
7   local basis?
8   A.   Yes, yes.
9   Q.   Okay. So you think --
10   A.   It should reflect everything, because
11 they have -- they count local stations. They,
12 you know.
13   Q.   Okay. And the reason you get to the
14 17 or 19 percent mark in the Waldfogel -- I'm
15 sorry, in the Crawford regression is because,
16 as you said, Public Television has a lot of
17 time?
18   A.   Yes.
19   Q.   If we just go for a second here,
20 Geoff, to Exhibit 1087, which is the Israel
21 written rebuttal testimony. And go to page 19,
22 Table 5.
23   Do you see that up on the screen
24 there? We didn't put Israel's testimony in
25 your binder. We do have a copy here if you

2553

1   want to see the whole thing. But I am really
2   just focusing on --
3   A.   This is Ducey and Crawford?
4   Q.   Yes.
5   A.   Oh, you mean this is a chart from
6   Israel's report? Is that what you are saying?
7   Q.   Written rebuttal testimony. Did you
8   review that?
9   A.   I did.
10   Q.   Okay. And Ducey was the gentleman who
11   actually categorized and calculated the
12   different minutes for the Waldfogel study in
13   the 2004-'05 proceeding. Right?
14   A.   Right.
15   Q.   Okay. So I want to focus for a moment
16   on Crawford, who simply takes this information
17   directly from -- I'm sorry.
18   A.   Israel takes the information from
19   Crawford?
20   Q.   Exactly. Do you want to do this?
21   (Laughter.)
22   BY MR. GARRETT:
23   Q.   And we see that your share of minutes
24   is 36.3 percent. By your, I mean Public
25   Television's share.

2554

1   A.   Yes.
2   Q.   Okay. And that is, in fact, the
3   highest share of minutes in the -- of any of
4   the categories, correct?
5   A.   According to this table. I mean, I
6   know it's high. I've seen things that -- I
7   know it is one of the higher categories. Let
8   me put it that way. If it's not the highest,
9   it's very close.
10   Q.   All right. I mean, this is sort of a
11   share, a volume share, would you agree?
12   A.   Yes. So I didn't look at minutes. I
13   looked at -- I looked at change in subscriber
14   instances.
15   For PTV standing by itself, it
16   shouldn't really matter if there are more
17   subscriber instances or more minutes because
18   there are there 24 hours, for the most part,
19   you know, of programming, for the most part.
20   But for other categories of
21   programming, first of all, they could be within
22   the -- and Canadian, that would be the -- that
23   would be the same. All right?
24   But for other categories it would be
25   the percent compensable. And then within that

2555

1   compensable, there could be like more sports
2   and less Program Suppliers or vice versa or
3   something. Right?
4   So I believe the compensable minutes,
5   the percent of the time that's compensable for
6   WGN went down over the two periods, so I don't
7   think it is so much that PTV is at a higher
8   share. It is that the other people are, you
9   know, the total went down because of that.
10   Q.   So Public Television, you are
11   basically getting 24 hours of programming a day
12   and a lot of which kind of repeats itself,
13   correct?
14   A.   A lot of all programming repeats
15   itself to some extent.
16   Q.   Well, not sports. Okay? I mean,
17   people only watch that once. Right?
18   A.   You know, sometimes they -- I mean, at
19   least -- well, maybe this is only true of cable
20   channels, but the Yes Channel repeats the
21   Yankee games. I don't know.
22   (Laughter.)
23   THE WITNESS: So, you know, if you
24   missed it, you could watch it.
25   BY MR. GARRETT:

2556

1   Q.   I'm not sure. If it's not a Cubs
2   game, I don't watch it.
3   A.   I am not a Yankees fan.
4   Q.   Good for you. Good for you. I hope I
5   didn't offend anybody.
6   (Laughter.)
7   BY MR. GARRETT:
8   Q.   But your share of time in these
9   regression analyses that you were comparing
10   went up between '04-'05 and 2010 through '13,
11   correct?
12   A.   Yes.
13   Q.   And at the same time the Program
14   Suppliers went down from about 50.1 percent in
15   '04-'05 to 33.3 percent?
16   A.   Right. I'm assuming these numbers are
17   correct. If they are not, you know, they are
18   not. But that's what -- that's what these
19   numbers show.
20   Q.   Okay. All right. The bottom line,
21   though, is that if we look at just Public
22   Television for a moment, your, call it value
23   share, in Crawford is about half of your volume
24   share. Does that sound right?
25   A.   You are saying 9.9 percent is half of

2557

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1    20.8 percent?
2         Q.    No.  I am saying that the share that
3    you get in Crawford, which you measured as
4    either 17 to almost 19 percent --
5         A.    Oh, okay, yes, yes.
6         Q.    -- that's roughly half of your volume
7    share of 36.3 percent?
8         A.    Oh, I see, oh.  Well, yes, um-hum,
9    because -- because of the five -- because of
10   the five cents compared to the others, right,
11   as you just showed.  Right?  That's how you --
12   that's how you get the -- yeah.
13        Q.    Understood.  You have got a lot of
14   programming that has a marginal value that is
15   down near the bottom of the different
16   categories.
17        A.    Right.  We have -- we have programming
18   only going to a portion of stations but there
19   is a lot of the programming and, in determining
20   the price in the regression, they put in all
21   the minutes.
22              And so, you know, that's -- the
23   relationship is the price to the -- to the
24   volume.
25        Q.    And this programming, as we
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2558

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1    established earlier, is going to only about
2    16 percent of all cable subscribers on a
3    distant signal basis, correct?
4         A.    And Crawford is picking that up in his
5    regression because he is doing subscriber
6    growth.
7         Q.    Understood.
8         A.    So, in other words, even going to only
9    16 percent, it is getting a bigger, you know,
10   it is getting as big as Program Suppliers, sort
11   of implying that 16 percent of the programming
12   is compensable of Program, you know, Suppliers
13   if they went to 87 percent.
14        Q.    Okay.  Let me just go to slide 7,
15   Geoff.  So you see here we just put your volume
16   share in Crawford, which is that 36.3 percent,
17   and then we showed the different value shares,
18   much like you have done in your testimony,
19   recognizing that in Crawford it is either 17 or
20   19 percent.
21              Do you see that?
22        A.    Yes, I see you have the -- you used
23   the 17 percent, but that's his preferred
24   estimate.
25        Q.    Exactly.  And the bottom line, I mean,
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2559

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1    you have looked at all these studies.  Is it
2    fair to say that in all the studies --
3         A.    I -- I did not use fee as gen.
4         Q.    Well, we will.  We will today, believe
5    me.
6         A.    Okay.
7         Q.    In the Crawford, Israel, Horowitz, and
8    adjusted Bortz studies, regardless of which one
9    you use, Public Television's share of relative
10   market value is going to be less than its time,
11   its volume?
12        A.    Yes.
13        Q.    Okay.  Go back to the slide number 6.
14   And the situation with Public Television is
15   similar to that with Program Suppliers,
16   correct, you know, we see here that they also
17   have a relatively low marginal value according
18   to Crawford?
19        A.    Yes.
20        Q.    And, like you, they also have a
21   relatively large volume share?
22        A.    PTV and Program Suppliers have larger
23   volume shares, right.
24        Q.    And if we --
25        A.    Wait.  You have to understand the
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2560

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1    regression uses those volumes.
2         Q.    Understood.
3         A.    Right, because otherwise if they use
4    different volumes, they would get different
5    marginal values.  Right?
6         Q.    But when they use volume and the value
7    for each of the categories, you come up with
8    your 17 to 19 percent, correct?
9         A.    Right, Crawford comes up with that.
10        Q.    And the Program Suppliers comes up
11   with a number of about, what is it, it looks
12   like 23, 24 percent?
13        A.    It would be higher because you see
14   the, you know, the --
15        Q.    Oh, but they have a little less time
16   than you.
17        A.    Let's see.  In Crawford, it was --
18   Program Suppliers was 24 percent by the, you
19   know, initial analysis.
20        Q.    So if we use the Crawford study and
21   award Public Television the 17 to 19 or
22   20 percent, whatever you are asking for, the
23   appropriate award for Program Suppliers would
24   be about 24 percent, correct?
25        A.    If you relied on -- if you relied on
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2561

1   Crawford and the changed circumstances method,
2   yes.
3   Q.   Okay. Let's go back. You talked a
4   little earlier about the digital conversion
5   that took place in 2009. Do you recall that?
6   A.   Yes.
7   Q.   Okay. And you are aware that, you
8   know, prior to that time there were questions
9   about whether digital signals or the multi-cast
10   signals could be carried pursuant to the
11   Section 111 compulsory license?
12   A.   I'm only vaguely aware of that, but.
13   Q.   Okay. And you're aware that there
14   were issues as to whether or not the FCC
15   must-carry rules would apply to the carriage of
16   multi-cast signals?
17   A.   I only know generally that it was --
18   there was a consideration of maybe changing
19   things due to digitization. I really did not
20   follow that debate.
21   Q.   Okay. Were you aware that in the year
22   2005, before this conversion, that various
23   Public Television entities, such as PBS,
24   negotiated a deal with the National Cable
25   Television Association concerning the carriage

2562

1   of multi-cast PTV signals?
2   A.   I was not aware of that. I saw that
3   you had something, some paper to that effect,
4   but I don't know whether that was -- I didn't
5   know anything about it.
6   Q.   So as part of your assignment here,
7   you did not look at the terms of that deal,
8   which was negotiated in the, you know, the
9   marketplace that existed, to determine what the
10   arrangements were between Public Television, on
11   the one hand, and the National Cable Television
12   Association?
13   A.   I did not look at that, no.
14   Q.   Do you think in trying to get an idea
15   of what would happen in a hypothetical
16   marketplace, that what happened in connection
17   with that negotiation would be instructive?
18   A.   I don't know. It is possible. It
19   could be. But I didn't know about it and I
20   didn't look at it.
21   Q.   Okay. Fair enough.
22   You're aware, are you not, that after
23   STELA was enacted in 2010, that cable operators
24   could carry multi-cast signals on a distant
25   basis, as well as local basis, without paying

2563

1   any Section 111 royalty?
2   A.   I think there was -- it was -- I
3   thought that there was a caveat to that, that
4   it had to be something, if they had done
5   something before and if they were indemnified
6   by the, by the television station, something --
7   something like that.
8   Q.   Okay. Let go to Exhibit 1104, which
9   is a statement of account. Do you have that
10   there?
11   A.   No. Give me a hint where.
12   Q.   It is in the smaller binder. The one
13   that has --
14   A.   Oh, I'm sorry. I was looking in the
15   bigger one. Got it.
16   Q.   All right. You have seen statements
17   of accounts filed with the Copyright Office
18   before?
19   A.   Yes, I have.
20   Q.   Okay. And can you tell who filed this
21   particular one?
22   A.   This is from Comcast of California.
23   Q.   All right. And this is for, it says
24   San Francisco system, correct? Do you see
25   that?

2564

1   A.   Yes, that's San Francisco and
2   surrounding area.
3   Q.   All right. So if we just go to --
4   keep it up on the full screen for a second,
5   Geoff, and we go to the second page.
6   Do you see the various legal entities
7   that it is filing on behalf of, correct?
8   A.   Yes.
9   Q.   And then we go to the next page, this
10   is where they list all the different
11   communities that they are --
12   A.   Yes.
13   Q.   -- serving?
14   A.   Right.
15   Q.   And I think there is a couple more
16   pages of communities. It says -- go ahead.
17   A.   Yes, it looks like they have, you
18   know, seven different channel line-ups serving
19   these many different communities.
20   Q.   All right. It's a huge number of
21   systems. It's a pretty large system, correct?
22   Well, go to the next -- go to the next page,
23   Geoff.
24   See it has got over a million
25   subscribers there? Do you see that in block

2565

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 1  form?
 2      A.    Yes, oh, yes.
 3      Q.    All right.  We skip to the next page,
 4  this is where they start giving their channel
 5  line-ups for all the different subgroups.  Do
 6  you see that?
 7      A.    Yes.
 8      Q.    And I think this one, channel line-up
 9  A, continues to the next page?
10      A.    Yes.  Yes.
11      Q.    And the thing to note is that, like
12  KQED, which is a Public Television station, is
13  actually a local signal on this channel
14  line-up, correct?
15      A.    I think they are alphabetical.  Yes.
16  Right.  So they have KQED and some multi-casts
17  from them.  They have another one, KRCB and KM
18  -- there are several Public Television stations
19  in this line-up, as well as multi-casts that go
20  along with them.
21      Q.    And they are all local; the only
22  distant signal at least on this channel line-up
23  is WGN?
24      A.    Yes.
25      Q.    All right.  And if we -- over the next
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2566

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 1  several pages they identify the different types
 2  of channel line-ups.
 3      A.    Yes.
 4      Q.    We just looked at channel line-up AA,
 5  correct?
 6      A.    That's right.
 7      Q.    And then they have channel line-up
 8  AB --
 9      A.    Right.
10      Q.    -- also has a lot of local signals,
11  including KQED, correct?
12      A.    Right.  That and another -- and two,
13  two or three, three other educational stations.
14      Q.    All right.
15      A.    Main ones.
16      Q.    And WGN is its --
17      A.    Yes.
18      Q.    -- only distant signal?  And I want to
19  skip ahead to their channel line-up AE.  Do you
20  see that?
21      A.    Yes.
22      Q.    So here we see that KQED, which was
23  local in other areas, is actually distant on
24  whatever subgroups are served with channel AE,
25  correct?
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2567

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 1      A.    That's correct.  It has a local PTV,
 2  KTEH.
 3      Q.    Right.  If you look there at column 5,
 4  Basis of Carriage, do you see that?
 5      A.    Yes.
 6      Q.    And the "O" signifies that KQED is
 7  distant, correct?
 8      A.    Yes, or it's not exempt.
 9      Q.    Okay.  And the E stands for exempt,
10  correct?
11      A.    Yes.
12      Q.    And if we go up to the instructions
13  there for column 5, do you see that?
14      A.    Yes.
15      Q.    And they explain there in the second
16  paragraph, and I'm just going to quote, "for
17  the retransmission of a distant multi-cast
18  stream that is not subject to a royalty payment
19  because it is the subject of a written
20  agreement entered into on or before June 30th,
21  2009, between a cable system or an association
22  representing the cable system and a primary
23  transmitter or an association representing the
24  primary transmitter, enter the designation E."
25          Do you see that?
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2568

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 1      A.    Yes.
 2      Q.    So would it be your understanding that
 3  the carriage of signals pursuant to an
 4  agreement that might have been entered into
 5  between Public Television entities and the
 6  National Cable Television Association would be
 7  exempt?
 8      A.    Well, or a cable system or, you know,
 9  I take it that's what that language, system or
10  an association, an owner or whatever.
11      Q.    Right.
12      A.    If it was -- and it's so indicated,
13  and, you know, we didn't include the exempt
14  stations.
15      Q.    They are not included in the CDC data?
16      A.    No, not as distant signals, no.
17      Q.    And you don't think they should be?
18      A.    No.
19      Q.    Good.  Okay.
20          And if --
21      A.    Because they didn't pay a, you know,
22  they didn't pay the royalty.
23      Q.    And if questions were asked on a
24  survey about valuing those exempt distant
25  signals, that would not be a correct procedure?
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2569

1   A.   Right. They should only be -- they
2 should only be included if they are -- if they
3 are valued. But I didn't see -- I didn't see
4 any extent to which they were included.
5   Q.   Okay.
6   A.   And valued.
7   Q.   All right. Can you tell how many
8 distant signal equivalents the system had,
9 total?
10   A.   I'm sure you can from the statement,
11 but it's -- I think you might have to do some
12 math.
13   Q.   Well, you could also go to DSE
14 schedule, page 11 of this, which is about, you
15 know, a dozen pages from the end.
16   A.   From the -- I'm sorry, from the end?
17   Q.   Yeah. It is DSE schedule, page 11.
18   A.   Oh, I see page 13. Wait. I'm close.
19 Yes.
20   Q.   All right. So this particular system
21 had 1.25 DSEs, correct?
22   A.   No. Oh, wait a minute. Is the -- the
23 part above is the example, right?
24   Q.   Well, the block says "computation of
25 DSEs for category O stations."

2570

1   A.   Yes, but I think this might be unique
2 DSEs. I am not sure. I'm -- I'm just not -- I
3 see it says 1.25.
4   Q.   Okay, if you are not certain. Let me
5 just ask you to turn to --
6   A.   Okay, and the reason that I said that
7 is I think that they only include the KQED for
8 the subscriber groups that carry it as a
9 distant, you know, in some subscriber groups it
10 is 1.25 and in some it's 1.
11   Q.   Right. But system-wide it would be
12 1.25 DSEs?
13   A.   Well, not the way -- not the way it is
14 counted by CDC, I don't think.
15   Q.   How does CDC count it?
16   A.   I think they -- they count the -- if
17 they are showing -- they don't show it by
18 subscriber group so they would show all the
19 subscribers, the million something to the
20 system, and then they would say a
21 certain percent of them got the .25.
22   Q.   Let me ask you just to turn to -- go
23 back to the primary form here on page 7. This
24 is the Space L copyright royalty fee.
25   A.   Is this after all those stations?

2571

1   Q.   Yes, after all the channel line-ups.
2   A.   Yes.
3   Q.   Yeah, it is like the -- it is a couple
4 pages after that. But if you look on the
5 right-hand side, you will see Space L. That's
6 where I want to go to.
7   A.   Oh, I see what you -- I'm sorry. I
8 will try to look at it on the screen.
9   Q.   Okay.
10   A.   Oh, I found it. I found it.
11   Q.   All right. So you see the block 1
12 there talks about minimum fee, the minimum fee
13 for this system would be 1.775 million dollars?
14   A.   Yes.
15   Q.   But, in fact, when they look at the
16 base rate fee in block 3, it comes up with the
17 1.6 million dollars?
18   A.   Yes.
19   Q.   So by using these -- calculating it
20 through all the different subgroups, they
21 actually would be paying a base rate fee of
22 less than the minimum fee, correct?
23   A.   No. It is showing -- I'm sorry. I
24 really -- I have worked with these statement of
25 accounts, but it takes a while to get back into

2572

1 it. And I can't actually follow the
2 calculation part here. I see the million 775
3 and then I see a million 9, and I don't know
4 how -- I don't know how the 1597. It may be
5 some areas they didn't import WGN and they had,
6 so.
7   Q.   Or in some areas they didn't import
8 KQED as a distant signal because it was already
9 available as a local signal.
10   A.   Yes. No, no, I understand that. But
11 if they -- if they imported -- I'm just not
12 sure how you would get to the 1597 unless they
13 didn't import WGN in the whole system.
14   Q.   Well, wasn't that the whole purpose of
15 STELA, to allow cable operators to create these
16 subgroups and calculate the royalties on a
17 subgroup basis as opposed to doing it on a
18 system-wide level?
19   A.   Well, I don't know if that was the
20 whole purpose of STELA.
21   Q.   Fair enough.
22   A.   But that was something that happened,
23 yes.
24   Q.   Okay. And isn't that what's being
25 done here?

2573

1   A.   I'm -- I'm at a loss to understand
2   this, I have to say.
3   Q.   Okay. All right. Well, that's enough
4   of that then.
5   Let me ask you to turn to
6   Exhibit 1103.
7   JUDGE BARNETT: Before we go there,
8   Mr. Garrett, where are we? How much longer do
9   you have?
10   MR. GARRETT: We're on page 14 of 24.
11   JUDGE BARNETT: Then I think we should
12   take our noon recess before we change gears.
13   We will be at recess until eight after 1:00.
14   (Whereupon, at 12:08 p.m., a lunch
15   recess was taken.
16
17
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25

2574

1   AFTERNOON SESSION
2   (1:13 p.m.)
3   JUDGE BARNETT: Please be seated.
4   Mr. Garrett.
5   MR. GARRETT: Thank you, Your Honor.
6   BY MR. GARRETT:
7   Q.   Ms. McLaughlin, I'd like to turn to
8   another topic here and that's the Bortz
9   adjustment that you did.
10   A.   Yes.
11   Q.   And let me start by going to your
12   current testimony here at page 14, footnote 24.
13   A.   Yes.
14   Q.   Page 16, footnote 24.
15   A.   14, I think.
16   Q.   I'm sorry, page 14, footnote 24. Now,
17   in that final sentence there you say, "In
18   2010-13, there were an average of 16 omitted
19   systems in each year."
20   A.   Yes.
21   Q.   And these were the systems that were
22   in the original Bortz sample that carried only
23   Public Television stations as a distant signal,
24   only Canadian television stations as a distant
25   signal, or a combination of Canadian and Public

2575

1   Television signals?
2   A.   True.
3   Q.   Okay. And there were just 16 of them
4   in each of the years on average?
5   A.   Yes.
6   Q.   Okay. Now, you calculated your
7   adjustment based upon just those 16 omitted
8   systems in the -- from the sample, correct?
9   A.   Well, based on the 16, but as I
10   explained, I used the estimated response rate
11   as part of that. So it would be fewer.
12   Q.   I understand. I mean, but you started
13   with just the number of 16 in each year and --
14   A.   Exactly.
15   Q.   Right. And those were 16 that were
16   taken -- that were included in the original
17   sample that Bortz drew?
18   A.   Right. An average of 16, yes.
19   Q.   All right.
20   A.   And we talked about one -- a specific
21   year earlier in my direct testimony.
22   Q.   But you didn't go and take all of the
23   cable systems that would have carried only PTV
24   as distant signals or only Canadian as distant
25   signals during the years in question?

2576

1   A.   No.
2   Q.   And why not?
3   A.   Because I was trying to answer what
4   would happen to the Bortz results if they had
5   asked the people who carried -- you know, who
6   they picked up in their sample and they carried
7   only PTV and Canada. In other words, if they
8   hadn't thrown those out, this is the result
9   they would have gotten.
10   Q.   Right. And if you had instead of
11   confining yourself to just those systems in the
12   sample and looked at all systems in the
13   universe that met these characteristics, the
14   adjustment would have been much higher for
15   Public Television, would it not?
16   A.   If I added it in to only the people
17   who responded to the Bortz sample, yes.
18   Q.   Yeah. And as you said, when you took
19   those 16 on average each year, you took account
20   of the response rate, right?
21   A.   The response rate by strata, yes.
22   Q.   By strata.
23   A.   Um-hum.
24   Q.   And there was a different response
25   rate for each of the four strata, correct?

2577

1   A.   In each year, yes.
2   Q.   And you used --
3   A.   But it was something along the lines
4 of 50 percent. I mean, very roughly.
5   Q.   All right. But it wasn't 100 percent?
6   A.   No.
7   Q.   Okay. All right. Let me ask you to
8 turn to your chart 2 in your current testimony.
9   A.   Okay, that's on page 11.
10   Q.   Page 11, Geoff. Now, as I understand
11 it, what this chart shows is that in 2010-'13,
12 15.9 percent of the distant subscriber
13 instances consisted of Public Television
14 stations, correct?
15   A.   Yes.
16   Q.   And 69.2 percent consisted of
17 independent stations, correct?
18   A.   Correct.
19   Q.   And WGNA would have been included in
20 that 69.2 percent, correct?
21   A.   Correct.
22   Q.   And if we can just switch quickly here
23 to slide 12. So we've replicated the table
24 that you have here, chart 2, but broken the
25 independents down between WGNA and all other

2578

1 independents. Do you see that?
2   A.   The all other is the light yellow?
3 All other -- other independents?
4   Q.   Yes.
5   A.   Yes, I see that.
6   Q.   So then if you add the -- we'll stay
7 with 2010 through '13 -- the 59 percent and the
8 10.2 percent, it comes up with, I think, the
9 69.2 percent?
10   A.   Yes.
11   Q.   All right, okay. And is that
12 consistent with your understanding that the
13 vast bulk of those distant subscriber instances
14 for independent stations comprised of carriage
15 of WGNA?
16   A.   Yes.
17   Q.   Okay. And so when you look at this
18 chart here, we see that -- and WGNA went from
19 being 50 percent share in 2004-'05, to a
20 59 percent of distant subscriber instances in
21 2013. Do you see that?
22   A.   Yes, I do.
23   Q.   And is that consistent with your
24 research and experience here?
25   A.   I note that Mr. Trautman mentioned

2579

1   that.
2   Q.   Okay.
3   A.   So, I mean, he mentioned the 50 to 59.
4 I didn't check that, but I thought, well, if
5 WGN went up, then the other independents must
6 have gone down, which you're showing.
7   Q.   Yes.
8   A.   So I don't know that this is correct,
9 but I have no reason to believe it isn't.
10   Q.   All right. Well, it's based upon the
11 same data that underlies your chart 2, which is
12 in the record here. Assuming that it is
13 correct, the increase for WGNA between 2004-'05
14 and 2010-'13, amounted to 9 percentage points,
15 correct?
16   A.   Correct.
17   Q.   And so that's a little bit more than
18 double the amount of increase in the Public
19 Television distant subscriber instances,
20 correct?
21   A.   Yes, it's not -- it's -- you're
22 looking at the delta between them. And I was
23 looking at percentage change. So it would be a
24 lower percentage change but a bigger delta.
25   Q.   Because it started with a much higher

2580

1 number?
2   A.   Yes.
3   Q.   Okay. But you discuss in your
4 testimony this notion of revealed preferences,
5 correct?
6   A.   Yes.
7   Q.   And you say that the increase for --
8 of distant subscriber instances of Public
9 Television stations kind of shows a revealed
10 preference of cable operators for Public
11 Television stations?
12   A.   Yes.
13   Q.   And you say the same thing about WGNA?
14   A.   That they were carrying -- that they
15 were carrying more of it, yes. The only -- I
16 guess the only difference is with WGNA, since
17 the compensable percent went down, you don't
18 know, you know, which part of it.
19   Q.   Right. That's the time-volume issue,
20 right?
21   A.   Right. That's the part that has to be
22 separated out.
23   Q.   Okay. That's fine.
24   Now, let me ask you, Geoff, to pick up
25 slide 13.

2581

1   So here in slide 13, again working
2   with the same data, if you -- see the second
3   column there?
4   A.   Yes.
5   Q.   These are the different subscriber --
6   or the shares of distant subscriber instances
7   that are shown in your chart 2, correct?
8   A.   The middle column?
9   Q.   Yes.
10   A.   Yes.
11   Q.   All right. And so we see, again,
12   15.9 percent for Public Television, and this is
13   in the year 2010 through '13, of the
14   69.2 percent for independents. Do you see
15   that?
16   A.   Yes.
17   Q.   All right. So if we removed WGNA from
18   this mix here, Public Television would go up to
19   38.8 percent, correct?
20   A.   Of the remainder.
21   Q.   Yes.
22   A.   But -- but the remainder is a mix of
23   different kinds of programming.
24   Q.   Well, let's do it this way here: I
25   mean, you got 16 percent of 100 percent.

2582

1   A.   Yes.
2   Q.   Right? And if you remove what was 59,
3   say, 60 percent, correct, then you're going to
4   have 16 percent of the remaining 40 percent,
5   correct?
6   A.   Yes, yes.
7   Q.   And that will amount to close to
8   40 percent, correct?
9   A.   Yes.
10   Q.   All right. So if you don't take
11   account of WGNA in your analysis here, it can
12   have a very significant effect on Public
13   Television, correct?
14   A.   You mean if you use the bar on the
15   right? Or I guess I don't -- what does "if you
16   don't take account of WGN" mean?
17   Q.   If you eliminate WGNA from the mix
18   here and simply look at the remaining carriage
19   here --
20   A.   Right.
21   Q.   -- Public Television share goes up
22   significantly?
23   A.   Sure. And so does Canada -- you know,
24   so does everybody who is left, right, yeah.
25   Q.   Right. Okay. And the share that we

2583

1   end up getting for Public Television, excluding
2   WGNA, is about 38.8 percent. Do you see that?
3   A.   Yes, because they were the next
4   biggest one, right, of the bars in my chart.
5   You know, there was 59 -- or 15.9 percent and
6   then 10.2 for network and then 3. -- you know,
7   since they were the biggest one outside of the
8   yellow bar, then they're going to be the
9   biggest one here.
10   Q.   Okay. And so if I ask you now to turn
11   to your chart 7.
12   A.   Yes.
13   Q.   Do you have that? Which is on page
14   21.
15   A.   Yes, I see it.
16   Q.   This is where you show your share of
17   viewing in Dr. Gray's uncorrected study,
18   correct?
19   A.   Yes.
20   Q.   And your share of viewing there is up
21   to 33 percent; is that correct?
22   A.   Yes.
23   Q.   Okay. And so that's very close to
24   what would be shown if one just removed WGNA
25   from the whole mix here in looking at your

2584

1   distant subscriber instances analysis, correct?
2   A.   You mean it's close to that other bar,
3   the second bar that you put up?
4   Q.   Yes.
5   A.   Yes.
6   Q.   Okay.
7   A.   At least for the --
8   Q.   Well, it's actually the third bar.
9   A.   Well, the one on the right.
10   Q.   The one on the right. Okay.
11   A.   Yes. I don't know about the -- can we
12   flip back to that?
13   Q.   Sure. Geoff.
14   A.   But I don't know that that works for
15   everyone because Canada is 3.7 and it goes
16   to -- looking back in the other -- in the -- so
17   Canada here is 9, but on your new chart,
18   whatever one comes after this that you just had
19   up there, the -- it doesn't affect everyone the
20   same way. That's my point.
21   Q.   Okay. But the point is that if you
22   don't properly take account of WGNA in these
23   kinds of analyses here --
24   A.   Right.
25   Q.   -- that are based upon subject time

2585

1 measures, it can have a very significant
2 effect --
3   A.   Yes.
4   Q.   -- certainly at least on Public
5 Television?
6   A.   Yes, yeah, I totally agree.
7   Q.   Okay. And also you know that WGNA
8 converted from a broadcast station to a cable
9 network beginning like at some point in 2015,
10 correct?
11   A.   I did not know that.
12   Q.   All right. Well, assume that that is
13 the case and they are no longer being paid for
14 under the Section 111 royalty license.
15   A.   Um-hum.
16   Q.   Had they converted in, say, 2009, then
17 looking at your distant subscriber instances
18 analysis here, would have produced a share for
19 you -- that is, for Public Television -- of
20 around 38.8 percent?
21   A.   You know, I don't know that that's
22 true because when TBS dropped out and became a
23 super-station -- you know, it was a
24 super-station and became a cable network, then
25 WGN kind of filled in. You know, first there

2586

1 were a lot of people that didn't carry anything
2 and then WGN filled in.
3   So maybe, I don't know, if by 2018
4 people -- other people are starting to fill in.
5   Q.   All right. We did have this
6 situation, though, in 1998 as you say with TBS
7 converting. Right? It went from a
8 super-station to a cable network, correct?
9   A.   Um-hum.
10   Q.   Correct?
11   A.   Yes.
12   Q.   And we also litigated the '98-'99
13 proceeding involving cable royalties, correct?
14   A.   Yes.
15   Q.   And, in fact, in that proceeding,
16 there was a substantial increase in Public
17 Television's share of distant subscriber
18 instances. Do you recall?
19   A.   You know, I don't remember that. I
20 remember that there were a lot of people in
21 that -- cable operators, that didn't carry any
22 distant signals. That's what I remember from
23 that time.
24   Q.   Okay. You don't recall that your
25 share of distant subscriber instances -- by

2587

1 "your" I mean Public Television --
2 substantially increased?
3   A.   You know, from before, I don't believe
4 I looked at before '98-'99. I think '98-'99 is
5 the first year I started looking at these
6 measures.
7   Q.   All right. And the distant subscriber
8 instances analysis that you presented here was
9 presented as well in the 1998-'99 proceeding by
10 Public Television, correct?
11   A.   I think it was a different analysis,
12 but I think there was one presented. Was it
13 Mr. Johnson, Dr. Johnson?
14   Q.   Dr. Johnson. Remember him well.
15   Just --
16   A.   But I think there was something about
17 subscriber instances, but I think it was a
18 different analysis than I did.
19   Q.   As a point of CRB trivia here,
20 Dr. Johnson testified on a Saturday and to this
21 day holds the record for the longest answer to
22 any one question. It went on for almost 25
23 pages. And it was a Saturday.
24   (Laughter.)
25   JUDGE BARNETT: Enough said.

2588

1   THE WITNESS: Can I ask what his first
2 name was? Is it -- it wasn't Leland?
3 BY MR. GARRETT:
4   Q.   I didn't call him by his first name.
5   A.   No. Does anybody know? There was
6 someone of some renown, Leland Johnson.
7   Q.   Leland, yes. I think it was somebody
8 different.
9   But you don't recall how the --
10   A.   No. I recall that it wasn't the same
11 analysis, but that it did include subscriber
12 instances.
13   Q.   Okay. Let me ask you to turn now to
14 your testimony, your current testimony, at page
15 6.
16   A.   Yes.
17   Q.   And on this page is where you
18 reference fee generation? You discuss fee
19 generation in your --
20   A.   Yes, yes, at the bottom of page 6 I
21 mention it.
22   Q.   Okay. And you say that the analysis
23 has been found to be flawed.
24   A.   Yes.
25   Q.   "Because the fees generated by cable

2589

1 retransmission distant signals do not depend at
2 all on the relative" -- and we go to the next
3 page --
4   A.   -- market value of the signals.
5   Q.   "But rather are a function of the
6 payment rules themselves, which are the result
7 of legislative compromise and are arbitrary."
8 And you cite footnote 10.
9   And in footnote 10, that's your
10 testimony in the 2000-2003 proceeding, correct?
11   A.   Correct.
12   Q.   And in that proceeding, the issue was
13 whether the Canadian Claimants could receive an
14 award that was based upon fee generation. Do
15 you recall that?
16   A.   Yes.
17   Q.   They had submitted a constant sum
18 survey and fee generation methodology and said
19 the combination of the two should result in
20 their award for 2000-2003?
21   A.   Yes.
22   Q.   And you testified in that proceeding
23 in opposition to the claim of the Canadian
24 Claimants, correct?
25   A.   Yes.

2590

1   Q.   And is it fair to say that in the end
2 the Judges rejected your testimony and, in
3 fact, did award the Canadian Claimants a
4 royalty share commensurate with its fee
5 generation?
6   A.   Yes, they said that the relationship
7 was wobbly, but of the choice that they had,
8 leaving the fee the same or using fees gen,
9 which they were -- the only two choices
10 available to them because -- somehow because of
11 the way the proceeding worked, that they
12 adopted the fees generated.
13   Q.   Okay. And if we can just put up,
14 Geoff, the final determination of the Judges in
15 the 2000-2003 proceeding. And go to page
16 26804.
17   In the middle column down near the
18 bottom, do you see that it's highlighted?
19   A.   Um-hum.
20   Q.   It says, "We do conclude that the
21 1998-'99 CARP's fee generation approach should
22 be accorded deference, not as the methodology
23 to determine the relative marketplace value of
24 the Canadian Claimants' programming but as a
25 methodology to determine that value."

2591

1   Do you see that?
2   A.   Right. And then right below that, it
3 refers to the either/or choice.
4   Q.   Right. But it is a fact that fee
5 generation has been used in proceedings over
6 the years here as a measure of relative market
7 value?
8   A.   There have been many things that have
9 been used as a measure over the years; viewing,
10 fee generation. And some of them have later on
11 been, you know, not used.
12   Q.   Okay. And if we look at -- pull up my
13 next chart here, which is on -- I'm sorry,
14 slide 8. We tried to compare here the awards
15 that the Public Television Claimants have
16 received in the 1998-'99 proceeding to fee gen.
17 The award was 3.6 -- I'm sorry, fee gen was 3.6
18 and they received 5.7. Do you see that?
19   A.   Um-hum.
20   Q.   And then in 2004-'05, fee gen was 4.1
21 and they received 7.6.
22   A.   Yes.
23   Q.   And in 2010 through '13, their fee gen
24 is 5.4 percent, right?
25   A.   And are you saying they're receiving

2592

1 14.9 or --
2   Q.   I hope not.
3   (Laughter.)
4 BY MR. GARRETT:
5   Q.   But that's what they're claiming,
6 right? That's what counsel claimed during the
7 opening statements here, 14.9 to 19.7.
8   A.   I -- is there a question?
9   Q.   Well, probably not.
10   (Laughter.)
11 BY MR. GARRETT:
12   Q.   Can we go to the next slide. There's
13 probably not a question here either, but it
14 is --
15   (Laughter.)
16 BY MR. GARRETT:
17   Q.   But it is fair to say that the
18 Canadian Claimants over the years have had
19 their awards tied pretty closely to fee
20 generation.
21   A.   Their award was less than fee
22 generation -- I'm confused by the colors. The
23 green is the fee gen, fee generation numbers?
24   Q.   Yes.
25   A.   Okay. Well, they were specifically

2593

1   tied, you know, in one way, and then in another
2   they were -- in 2004-2005, I think that they
3   started with the survey but as the floor and
4   used the fee gen as the ceiling and came to
5   something in the middle. I don't remember in
6   the other...
7   Q.   That completes your answer?
8   A.   Yes.
9   MR. GARRETT: That completes my
10   cross-examination. Thank you very much,
11   Ms. McLaughlin.
12   JUDGE BARNETT: Thank you,
13   Mr. Garrett.
14   Any other cross-examination for this
15   witness? Will this be by Ms. Plovnick or
16   Ms. Dominique?
17   MS. DOMINIQUE: Me.
18   JUDGE BARNETT: Thank you.
19   CROSS-EXAMINATION
20   BY MS. DOMINIQUE:
21   Q.   Good afternoon. My name is Alesha
22   Dominique and I represent Program Suppliers.
23   The 2010 through '13 Bortz surveys
24   excluded from their eligible samples cable
25   systems that carried distant signals only in

2594

1   the PTV and/or Canadian category, correct?
2   A.   Right.
3   Q.   Now, the 2010 through '13 Horowitz
4   surveys did not exclude from their sample cable
5   systems that carried distant signals only in
6   the PTV and/or Canadian categories, right?
7   A.   Right, they included them. Horowitz
8   included them.
9   Q.   Would you agree that as between the
10   2010 through '13 Bortz surveys and the 2010
11   through '13 Horowitz surveys, that it was
12   better to include cable systems that carry
13   distant signals only in the PTV and/or Canadian
14   category than to simply exclude these cable
15   systems?
16   A.   Right. The Bortz as submitted and the
17   Horowitz, yes, it's better to include them.
18   Q.   And PTV gets a higher value allocation
19   in the Horowitz survey than in the Bortz
20   survey, correct?
21   A.   Oh, you mean the final answer?
22   Q.   Correct.
23   A.   Yes.
24   Q.   So when systems carrying distant
25   signals only in the PTV and/or Canadian

2595

1   categories are included, as they are in the
2   Horowitz survey, and the PTV gets a higher
3   value allocation?
4   A.   Well, yes, but, you know, in the
5   augmented Bortz, they are included too. So the
6   Horowitz survey gave an even higher value than
7   the augmented Bortz. So it wasn't just the
8   inclusion of PTV potential respondents. I
9   mean, in other words, Bortz threw them out. I
10   put them back in. And so the augmented Bortz
11   has those people back in. And Horowitz had
12   them in originally.
13   So I don't think the only reason that
14   the Horowitz survey is producing higher values
15   for PTV is because it included those
16   particular -- you know, those kind of
17   respondents that were ex'd out of the original
18   Bortz study.
19   Q.   Now, in the augmented Bortz survey,
20   you assumed a response rate that was consistent
21   with the response rate for the Bortz survey?
22   A.   Yes.
23   Q.   But because those systems, those
24   PTV-only and Canadian-only systems, were not
25   actually surveyed in the Bortz reports, you

2596

1   don't know what the actual response rate would
2   have been?
3   A.   That's right. It could have been
4   higher. I -- you know, I didn't want to
5   include all of them. Some of them surely would
6   not have, you know, responded, but I did -- I
7   did -- you know, I didn't really have a choice
8   with the -- I didn't know what the response
9   rate was, so I just assumed they would be the
10   same as the other people in the strata.
11   In Horowitz, how they responded is how
12   they responded.
13   Q.   Right. So Horowitz used the actual
14   response rates?
15   A.   Yes, exactly.
16   Q.   Okay. And that's unlike what you did
17   in the augmented Bortz survey?
18   A.   Right. I had to assume a response
19   rate.
20   Q.   Would you agree that as between the
21   Horowitz survey and the augmented Bortz survey,
22   that the Horowitz survey presents a better
23   basis for allocating shares to PTV?
24   A.   Between the Horowitz survey and the
25   augmented Bortz?

2597

1   Q.   Yes.
2   A.   I don't know. I did see that when I
3 looked at that one measure of potential bias as
4 to PTV in the rebuttal report, that the percent
5 of carriage of PTV, you know, how much PTV the
6 people who carried it carried, I found that the
7 Bortz survey was low, was on the low side, it
8 seemed to under-represent having a lot --
9 having a normal level of PTV, an average level
10 of PTV carriage, but the Horowitz had a higher
11 percentage of PTV carriage than the universe.
12   The Horowitz increase wasn't as high
13 as the decrease was lower, but they were --
14 they both had this type of participation bias
15 in the opposite direction. So I didn't really
16 -- I didn't reach the question, you know, was
17 one definitely better than the other. I saw
18 that on this particular measure, Horowitz was
19 closer to the universe, but in the -- you know,
20 but in the other direction.
21   I'm just saying I didn't really choose
22 between them. I saw that they each had -- they
23 each would have a potential bias.
24   Q.   So would it be your opinion that PTV
25 should fall somewhere in the middle?

2598

1   A.   If that measure is -- if that -- if
2 that's relevant and it looked to me like at
3 least part of it was explained by the rise in
4 system, I don't know whether -- it should be
5 someplace in between. Whether it's the middle
6 or not, I don't know.
7   And there are other -- you know, there
8 have been other criticisms of both surveys for
9 other factors, so I don't -- I didn't really
10 fully analyze that because the criticisms
11 didn't come out until the rebuttal report time
12 and they were in areas that I would have to
13 talk to somebody else to fully -- you know, to
14 get a full picture of, you know, the way the
15 question was asked or examples of programs, you
16 know, those kinds of criticisms.
17   Q.   So as between the Bortz survey and the
18 Horowitz survey, which survey has less bias?
19   A.   The augmented Bortz and the -- I
20 didn't look at plain Bortz, but --
21   Q.   Sure. As between the augmented Bortz
22 and the Horowitz.
23   A.   On that measure -- because I'm just
24 looking at PTV.
25   Q.   Sure. So as it relates to PTV --

2599

1   A.   Right. Yes.
2   Q.   -- which survey has less bias?
3   A.   Horowitz.
4   Q.   Would you agree that a survey that has
5 less participation bias is preferable to one
6 that has more participation bias?
7   A.   Yes. I mean -- yes, yes.
8   Q.   Now, I want to shift gears a bit. Do
9 you recall speaking with Mr. Garrett about
10 PTV's share? Well, I actually think it was
11 Mr. Dove, discussing with Mr. Dove PTV's share
12 of the basic fund?
13   A.   Yes.
14   Q.   Okay. Let's take a look at Table 3 on
15 page 25 of your direct testimony, which, again,
16 is, I believe, Exhibit 3012.
17   A.   Yes. Table 2 or Table 3? I think you
18 said 3, but 2 is on the screen.
19   Q.   I said -- let me get there with you --
20 I think it's Table 3.
21   A.   There it is on the screen.
22   Q.   Okay. So for PTV's share of the basic
23 fund for 2010 through 2013 based on surveys and
24 regressions, you have a column titled Horowitz
25 survey.

2600

1   A.   Yes.
2   Q.   And for 2010, you list 8.8 percent.
3 For 2011, it's 15.6. For 2012, it's 17.6. And
4 for 2013, it's also 17.6.
5   .   Are these numbers -- these numbers are
6 not from the Horowitz survey, correct?
7   A.   It's the -- it's derived from the
8 Horowitz survey. So if you take the numbers in
9 the -- in the Horowitz survey as PTV's share of
10 total royalties and divide that by the basic
11 fund share of total royalties, which is
12 approximately 86 percent, you get these
13 numbers.
14   Q.   Okay. So let's take a look at the
15 Horowitz report, which is Exhibit 6012. There
16 should be a binder right next to you.
17   A.   With a green cover?
18   Q.   With a green cover, correct.
19   MS. PLOVNICK: If I may approach, I
20 can just hand her if that would be faster.
21 BY MS. DOMINIQUE:
22   Q.   If it's faster, co-counsel can hand
23 you a copy.
24   MS. PLOVNICK: You may already have
25 it.

2601

1   THE WITNESS: This one?
2   MS. PLOVNICK: There's so many
3   binders.
4   THE WITNESS: Thank you.
5   BY MS. DOMINIQUE:
6   Q.   And if you take a look at Table 3.2,
7   which is on page 16.
8   A.   Yes.
9   Q.   So this table reflects Horowitz's
10   weighted values for non-network programming
11   carried by distant signal stations in 2010
12   through '13 royalty years, correct?
13   A.   That's right.
14   Q.   So the numbers that appear in Table
15   3.2 are not the same as the numbers that appear
16   in your Table 3?
17   A.   No, in other words -- right. In
18   Horowitz shows his results as what percent of
19   all royalties because he used all royalties
20   to -- as his weights for the -- to the answers
21   in his survey.
22   What percent turned out to be PTV, so
23   that if PTV got, you know, 7.69 percent in 2010
24   of total royalties, since they're only
25   collecting from the basic fund, they have to

2602

1   get a bigger share of the basic royalties in
2   order to get the same dollars.
3   Q.   Okay. So just to be clear, you're not
4   suggesting that the values that you calculated
5   in Table 3 and the values that appear in the
6   Horowitz report at Table 3.2 are the same?
7   A.   No, no. One is -- I made this
8   adjustment, right. And I think I explained it
9   in the testimony. I intended to, if I didn't.
10   Q.   Do you recall discussing with
11   Mr. Garrett just a few minutes ago, or maybe it
12   was before lunch, the hypothetical market?
13   A.   Yes.
14   Q.   Okay. And you analyzed the
15   hypothetical market in the 2010 -- or 2000-2003
16   proceeding?
17   A.   No, I didn't actually analyze the
18   hypothetical market. I was just setting up,
19   you know, what would happen in a hypothetical
20   market and how that relates to what we were
21   trying to do and why demand is what's
22   important, that, you know, it was really the
23   theoretical setup of why we're doing what we're
24   doing.
25   Q.   For purposes of this proceeding, did

2603

1   you analyze the hypothetical market?
2   A.   We looked at -- we discussed different
3   ways that people do things, both -- I mentioned
4   again, both the concept of demand is what's
5   important and that sometimes you could use a
6   benchmark but we didn't find any here. It's
7   only in that context, possibly considering, you
8   know, bargaining values, but we didn't see how
9   that would work, and so it was really just sort
10   of setting the stage approach.
11   Q.   So --
12   A.   In both -- in both times.
13   Q.   Understood. So in your discussion
14   with Mr. Garrett, I believe you testified that
15   your assumption, notwithstanding what you
16   actually did here, that -- excuse me -- your
17   assumption was that a hypothetical market would
18   still be regulated?
19   A.   No, all right. So I think maybe that
20   -- I don't know if that was confusing to -- I
21   didn't mean it to be confusing. I was saying
22   how could we -- putting myself back in the --
23   into that time period that I was analyzing
24   then, how could we approach this? Well,
25   hypothetically, if there was a real market, we

2604

1   would have, you know, cable operators
2   bargaining, say, with the stations, and if we
3   did have that occurring, how would it take
4   place? It would only be relevant for us if it
5   took place under the same circumstances now,
6   but all of this is hypothetical. Do you know
7   what I mean?
8   There is no -- we never saw that. So
9   it's more of a way to think about things, that
10   if we were to use some benchmark or some way of
11   thinking about it, the way of thinking about it
12   should be -- should reflect what it is we're
13   trying to do here. That's all I meant.
14   Q.   So do you have an opinion of what a
15   hypothetical market, for purposes of these
16   proceedings, could look like?
17   A.   You know, not -- I mean,
18   hypothetically what it could look like? It --
19   you know, not really. I mean, I didn't -- I
20   think I -- I thought the introduction was
21   better this time than before in the sense that
22   I thought it was a clearer way of explaining
23   things. And maybe that's why I didn't use
24   those words "hypothetical market," but I was --
25   I was -- I was just trying to think how would

2605

1 we -- do we approach trying to come up with a
2 relative market value when we don't have an
3 actual market? That's all I meant.
4   Q.   Would you assume that the current
5 prohibition on the insertion of advertising
6 would still exist?
7   A.   If we were -- if we were looking for
8 something that would help us understand what
9 we're trying to do here, you would have to have
10 a prohibition on the insertion of advertising
11 because we have -- we had in 2010 to 2013 a
12 prohibition on the insertion of advertising.
13   So we wouldn't want to look at
14 something that was different in a major way
15 than what it is we're trying to analyze.
16   Q.   So that's the regulation. Would you
17 presume some regulation then in the
18 hypothetical market?
19   A.   For a hypothetical market to be useful
20 to analyzing what we're trying to do here, it
21 would have to look in some way like what we're
22 trying to do, so there would -- having that
23 restriction. You know, whether -- whether it
24 -- in the satellite rate proceeding, I looked
25 at cable networks in part as a benchmark for

2606

1 what the rate should be for satellite signals,
2 but in those cases, the rate that I used was a
3 rate for people who did not insert the
4 advertising because I wanted it to be similar.
5 Maybe that example helps.
6   Q.   So, essentially, you think that the
7 hypothetical market would still be a regulated
8 market?
9   A.   Yes, or subject to the same
10 restrictions.
11   JUDGE STRICKLER: I have a question
12 for you in that regard, if we go to page 4 of
13 your -- I guess it's your direct testimony in
14 this case, so that's Exhibit 3012.
15   THE WITNESS: Yes.
16   JUDGE STRICKLER: In your first
17 paragraph under section B, relative marketplace
18 value. Do you see that?
19   THE WITNESS: Right.
20   JUDGE STRICKLER: In the last sentence
21 there, you write, "In past proceedings, the
22 CARP has noted that" -- and then a quote within
23 your quote, quoting the CARP determination --
24 "'relative marketplace value is the sole
25 relevant criterion that should be applied'" --

2607

1 so that's the end of the CARP quote -- "and
2 this standard" -- CARP quote again -- "to
3 'simulate market valuation'" -- end CARP quote
4 -- "as if there were no compulsory licensing
5 regime -- was adopted and has been carried
6 forward by the CRJs."
7   That's the end of your quote. Do you
8 see that?
9   THE WITNESS: Right, yes.
10   JUDGE STRICKLER: So it sounds to me
11 at least, and correct me if I'm wrong, that
12 your understanding is that the legal guideposts
13 from the CARP and carried forward by the Judges
14 has been a marketplace in which there is no
15 compulsory licensing regime, which sounds close
16 to what counsel was asking you about, as to
17 whether or not there would be any regulation.
18   At least your phrase "as if there were
19 no compulsory licensing regime" at least
20 suggests that you meant no regulation at all.
21 First let me ask you that.
22   THE WITNESS: Yeah.
23   JUDGE STRICKLER: Is that what you
24 meant, no regulation at all by no compulsory
25 licensing regime?

2608

1   THE WITNESS: Well, whether -- whether
2 it would be by regulation or by other -- other
3 factors, it should be something that wouldn't
4 have one difference about it, that advertising,
5 say, was inserted and that it was a big -- so
6 let me explain.
7   That suppose I said, well, here are
8 other signals that somehow mirror exactly what
9 we're looking at. And I can see that the price
10 charged for them, was, you know, 2 dollars a
11 subscriber, and it was split up 50/50 in some
12 way.
13   So now we have a relative market
14 value, 50 for this side and 50 for the other.
15 Well, but then it turns out that, in this
16 benchmark, there's -- in addition to the price
17 that they pay, they get to insert advertising.
18 So -- and maybe one of the two gets to insert a
19 lot more advertising, and so the relative price
20 wouldn't -- wouldn't work as translated into a
21 regime where you're not allowed to insert
22 advertising.
23   JUDGE STRICKLER: I understand that.
24 That is a helpful way of restating what you
25 said before, so I appreciate that.

2609

1   But it sounds like what you're saying
2   is actually that we can't use an unregulated
3   marketplace as our, for lack of a better word,
4   benchmark, to apply in this case because it
5   would be so different that the standard has to
6   be something else. And then you go on after
7   you've basically made the same statement.
8   THE WITNESS: Right.
9   JUDGE STRICKLER: In the next
10   paragraph, you say you look at possible
11   solutions for overcoming them, meaning --
12   "them" meaning the challenges relating to
13   the --
14   THE WITNESS: Right.
15   JUDGE STRICKLER: -- absence of a
16   marketplace. So it sounds like you're really
17   saying the standard itself as enunciated by the
18   CARP and as carried forward by the Judges
19   really doesn't work because you're not going to
20   -- the unregulated marketplace is so different,
21   if I'm understanding your testimony
22   correctly --
23   THE WITNESS: Right.
24   JUDGE STRICKLER: -- is that we can't
25   apply that standard in this allocation case

2610

1   because they're just too discordant.
2   THE WITNESS: Well, that's -- I think
3   that's what's happened in actuality because in
4   the unregulated marketplace, there are things
5   like the insertion of advertising that make a
6   difference.
7   And that's why that I haven't seen
8   people point to that as a possible benchmark in
9   this case. You know, there have been -- there
10   are other cases where there is some kind of a
11   licensing regime and maybe under the judge, you
12   as well, where advertising isn't an issue and
13   people do point to benchmarks. And the
14   benchmarks may well be valid.
15   So I don't think that it means that
16   you shouldn't look for an unregulated market
17   without compulsory licensing, but that
18   unregulated market has to have the similar
19   characteristics to this one.
20   JUDGE STRICKLER: Thank you.
21   BY MS. DOMINIQUE:
22   Q.   So I'm going to move on to another
23   topic here. Excuse me. Do you recall your
24   discussion with Mr. Garrett about each claimant
25   group's share of compensable minutes?

2611

1   A.   Yes.
2   Q.   Okay. You did not calculate
3   compensable program minutes in this proceeding,
4   did you?
5   A.   No, I did not.
6   Q.   Okay. So you don't know whether each
7   claimant group's share of compensable program
8   minutes changes if one were to weight those
9   minutes by subscribers as opposed to not
10   weighting by subscribers?
11   A.   I don't know.
12   Q.   Let's take a look at Dr. Israel's
13   rebuttal testimony. It's Exhibit 1087. If you
14   don't have it in front of you, I can get you a
15   copy.
16   A.   These all seem to start with 6.
17   Q.   Or you can look at the screen.
18   A.   Okay.
19   Q.   Okay. Take a look, please, at page
20   19, Table 5. Okay, Table 5 is entitled Share
21   of Compensable Minutes by Claimant Group
22   Weighted by Subscribers.
23   A.   Yes.
24   Q.   And do you see for the column that's
25   labeled 2010 through 2013, we have shares for

2612

1   Sports, Program Suppliers, CTV, PTV,
2   Devotional, and Canadian ranging from 2.3 to
3   36.3 percent?
4   A.   Yes.
5   Q.   And consistent with the title of the
6   table, these shares are weighted by
7   subscribers. Is that your understanding?
8   A.   Yes. And I hadn't really focused on
9   that when Mr. Garrett was asking me the
10   question. They could be weighted by other
11   things. And royalties or, you know, and --
12   which may give different results.
13   Q.   Okay. But these are weighted?
14   A.   These are weighted by subscribers.
15   Q.   Okay.
16   A.   And thanks for pointing that out.
17   Q.   Okay. And these are what Mr. Garrett
18   discussed with you?
19   A.   Yes.
20   Q.   Okay. Let's take a look at -- have
21   you reviewed Dr. Gray's written direct
22   testimony in this case?
23   A.   Yes.
24   Q.   Okay. Let's take a look at Dr. Gray's
25   written direct testimony. It's Exhibit 6036,

2613

1   page 16, Table 1.
2   Dima, if you could pull that up.
3   A.   Yes.
4   Q.   Okay. Now, are you aware that
5   Dr. Gray calculated each claimant's share of
6   compensable minutes in a manner that was not
7   weighted by subscribers?
8   A.   I'm aware that there were criticisms
9   of Dr. Gray's weighting of the compensable
10   minutes, but I did not focus on that it was a
11   subscriber weight, which is why I -- on that
12   other chart, I had not noticed that it said
13   weighted by subscribers.
14   Q.   Right. And just to be clear, I can
15   represent that Dr. Gray did not weight here.
16   A.   No. I know there was a criticism of
17   his weighting, yes.
18   Q.   All right. So taking a look at Table
19   1 on page 16 of Exhibit 6036, the title is
20   Levels and Shares of Retransmissions and Volume
21   by Royalty Year.
22   If we look at the final column, the
23   share of all volume, we see Dr. Gray's
24   unweighted valuations of the share of
25   compensable minutes of retransmissions.

2614

1   If you compare Table 1, the final
2   column, to the table that Mr. Garrett discussed
3   with you, is there a difference in the volumes?
4   A.   Yeah. Actually, if I can turn to the
5   -- I can turn to page 16 here, if you could
6   pull up that other table because I don't think
7   I have Dr. Israel's.
8   Q.   Sure.
9   MS. DOMINIQUE: Permission to
10   approach.
11   JUDGE BARNETT: Certainly.
12   THE WITNESS: No, no, I see it here.
13   BY MS. DOMINIQUE:
14   Q.   Okay. All right.
15   A.   I mean, if you pull up that and then I
16   have this one here, if that works for others.
17   Q.   I understand. Okay.
18   A.   Yeah, I see that the -- I see that the
19   numbers -- well, they're in different orders,
20   but the numbers are quite different.
21   Q.   Okay. Is so if one were to weight by
22   subscribers, you get different numbers than if
23   you do not weight by subscribers, correct?
24   A.   Yes. I mean, it's a little bit hard
25   because this is an average for the whole time

2615

1   period and these are, you know, one year at a
2   time, but I know if you look at certain ones, I
3   see that they are -- I can see that they're
4   different.
5   Q.   Okay.
6   A.   So I'm not really sure. I know there
7   was another problem with Dr. Gray's study that
8   I can't discuss.
9   Q.   Okay.
10   A.   So I don't know to what extent the
11   other problem is -- or the weighting is the
12   result of the difference. I hope that was all
13   right to say.
14   Q.   Thank you.
15   MS. DOMINIQUE: No further questions.
16   JUDGE BARNETT: We're all aware of the
17   circumstances, so it's fine.
18   CROSS-EXAMINATION
19   BY MS. NYMAN:
20   Q.   Good afternoon, Ms. McLaughlin.
21   A.   Good afternoon.
22   Q.   My name is Jessica Nyman, and I
23   represent the Devotional Claimants in this
24   matter.
25   So you mentioned on your direct that

2616

1   you are currently an affiliated consultant at
2   NERA; is that correct?
3   A.   Yes.
4   Q.   And prior to that, you were a senior
5   VP, correct?
6   A.   Yes.
7   Q.   Well, I guess there was the
8   retirement.
9   A.   Yes.
10   Q.   But you were a senior VP and, in fact,
11   had worked at NERA since 1974; is that correct?
12   A.   Yes.
13   Q.   So you would agree that NERA is well
14   regarded for the quality of its experts,
15   publications, and studies; is that right?
16   A.   You know, I'm aware of my work and the
17   people that I work with. I'm aware of other
18   people. Right now I'm less aware of some of
19   the other people who are there. I'm not saying
20   anything bad about NERA. I'm just saying
21   I'm -- you know, we're -- it's not like a
22   committee approves what goes out.
23   There are people who look at -- who
24   look at things, but sometimes, you know, I've
25   seen things go out that I wasn't happy with.

2617

1   Q.   If I could pull up onto the screen
2 what has been marked as Exhibit 5033, please.
3 If we can't, then put it on the ELMO. Okay.
4 Do you see that on your screen?
5   A.   Yes.
6   Q.   And does that bear the markings of a
7 NERA Economic Consulting white paper?
8   A.   Yes. I don't really -- I have to say
9 Dr. Eisenach joined NERA after I retired, and I
10 don't -- I don't think I've actually ever met
11 him. So I don't -- you know, I can't really
12 opine about his work.
13   Q.   Sure. If we turn to the second page,
14 though, it says Dr. Eisenach is senior vice
15 president and cochair of NERA's communications,
16 media, and Internet practice. Do you see that?
17   A.   Yes, I do.
18   Q.   Do you have any reason to think that
19 NERA would have a senior vice president and
20 cochair of the communications, media, and
21 Internet practice that wasn't qualified or
22 knowledgeable in the field of communications,
23 media, and Internet practice?
24   A.   I am sure that Dr. Eisenach is a
25 qualified economist. You know, I'm not

2618

1 doubting that.
2   MS. NYMAN: Move to admit Exhibit 5033
3 into the record.
4   MR. STEWART: Objection, Your Honor.
5 There has been no foundation for the admission
6 of this document, which is by another economist
7 whom we have no opportunity to cross-examine so
8 that we understand this exhibit, and the
9 witness has already said she is not familiar
10 with it or him.
11   MS. NYMAN: I plan to just use this to
12 show a couple things and ask whether the data
13 that's presented in here is consistent with her
14 understanding of certain trends in the
15 retransmission consent to the marketplace.
16   JUDGE BARNETT: I don't think that's
17 going to be very elucidating for us, so the
18 objection is sustained.
19 BY MS. NYMAN:
20   Q.   So ignoring that then, do you remember
21 your conversation a few minutes ago with
22 Mr. Garrett on must-carry and retransmission
23 consent?
24   A.   Yes.
25   Q.   And you're aware that retransmission

2619

1 consent is a legal obligation for the stations
2 that elect -- or is a legal obligation separate
3 from the compulsory license that requires cable
4 systems to obtain consent from commercial
5 broadcasters that elect retransmission consent
6 prior to being able to retransmit their
7 signals; is that correct?
8   A.   Well, when you say it's separate, I
9 did study this at one time, not in the most
10 recent time period, but I saw that it was a
11 kind of a -- must-carry cannot really be
12 separated from retransmission consent because
13 if you -- it would be one thing to say -- to
14 say in terms of bargaining, the station says I
15 want 100 million dollars or you can't carry me,
16 and the cable system -- and the cable system
17 says, well, I won't carry you; I'll carry
18 somebody else instead.
19   Q.   And let me rephrase that because I
20 don't think I was clear. I'm not talking about
21 the separation of must-carry from
22 retransmission consent. I'm just saying that
23 the concept of retransmission consent and the
24 fees that may be paid under retransmission
25 consent are separate from the copyright

2620

1 compulsory license and the fees that are paid
2 to the copyright owners for the --
3   A.   Yes, I understand that they are
4 separate. I just meant that, you know, the
5 fact that you could fall back on must-carry,
6 you know, limits the bargaining power of the
7 other side.
8   Q.   Right. So would you agree that for
9 those broadcasters that do elect retransmission
10 consent instead of must-carry, that those
11 broadcasters expect to be compensated for the
12 rights to retransmit their broadcast signals?
13   A.   I assume that they are getting
14 something, but -- and I know in some cases, and
15 mostly I'm familiar with local retransmission
16 consent, and there are some people that have
17 expected a lot, but I don't -- I don't -- you
18 know, I don't really know any more than that.
19   Q.   Right. But --
20   A.   I don't know that everyone gets money.
21   Q.   Sure. But -- so you would agree that
22 in a local market, for example, where a big
23 broadcaster maybe a Nexstar or, you know --
24   MR. DOVE: Your Honor, this seems --
25 this line of questioning seems to be going

2621

1 beyond the scope of Ms. McLaughlin's direct
2 testimony and rebuttal testimony in the case.
3 I don't see the connection.
4   MS. NYMAN: It's going to be going to
5 changed circumstances, which is directly
6 related to what she testified to, Your Honor.
7   JUDGE BARNETT: I'll give you a chance
8 to make that connection. Overruled, Mr. Dove.
9 BY MS. NYMAN:
10   Q.   Sure. So on that point, are you aware
11 that in the time period -- you testified to
12 changed circumstances between the time period
13 of 2004 and 2005 and the time period that we're
14 discussing here, which is 2010 to 2013,
15 correct?
16   A.   Yes.
17   Q.   Were you aware that in the time period
18 of 2004 and 2005, by and large broadcasters
19 were not receiving cash compensation for the
20 rights to retransmit their signal?
21   A.   Distant signals?
22   Q.   No, no, local or distant, but just in
23 general, retransmission consent rights.
24   A.   You know, I don't remember when
25 retransmission consent -- I mean, I know that

2622

1 it didn't happen and then it happened, but I
2 don't -- I really don't know the date.
3   Q.   Are you generally familiar with the
4 trend, which has been since about 2005 or 2006,
5 there has been an upward trend in the fees
6 charged by broadcast stations to cable
7 operators for the rights to retransmit their
8 signals?
9   A.   Only -- I haven't seen data on that.
10 I've only -- I've seen -- I've seen, you know,
11 general newspaper articles. That's all.
12   Q.   All right. I believe in your NERA
13 biography, you listed as one of your areas of
14 specialty cable and broadcast rights and that
15 you've analyzed proposed U.S. FCC rules
16 concerning cable and broadcast television and
17 retransmitted television station rights. Is
18 that correct?
19   A.   Yes.
20   Q.   And you.
21   Re saying you're not familiar with --
22   A.   No, I'm --
23   Q.   -- any trends in retransmission?
24   A.   Right. I'm saying that between the
25 time periods that you -- that you refer to,

2623

1 that I did not study the trends in
2 retransmission payments.
3   Q.   Okay. Are you aware then that
4 retransmission consent applies only to
5 commercial stations and that Public Television
6 stations are not eligible for retransmission
7 consent fees?
8   A.   Yes, I am.
9   Q.   And that's why for -- Public
10 Television stations choose -- well, they elect
11 must-carry or they are must-carry stations and
12 you alluded earlier to commercial broadcasters
13 could choose must-carry, but they also could
14 choose retransmission consent?
15   A.   Locally, yes.
16   Q.   And retransmission consent applies to
17 distant signals as well, doesn't it?
18   A.   I only -- the only time that I looked
19 at retransmission consent, I was only looking
20 at it in terms of local.
21   Q.   If it were the case that
22 retransmission consent applied to distant
23 signals and, like in the local market, only
24 applies to commercial broadcasters, would you
25 agree then that a commercial or a cable system

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1 would have to pay their compulsory copyright
2 fee and, in addition to that, negotiate with
3 the broadcaster for a commercial signal? Would
4 you agree with that?
5   A.   If -- if -- not if that isn't a
6 tautology. You know what I mean? If you're
7 saying if we assume it, then it would happen?
8   Q.   Well, I'm just saying the difference
9 between commercial and public. So
10 retransmission consent applies to commercial
11 stations, not to public stations, correct? In
12 the local market?
13   A.   Yes.
14   Q.   And if we apply to the distant market?
15 Just assume now that it does apply to the
16 distant market.
17   A.   But are you suggesting that in the
18 distant market, that there are commercial
19 stations that pay -- that get paid by cable
20 systems to be carried distantly, you know,
21 outside of their local area, and those stations
22 -- and those cable operators also pay into
23 retransmission consent? I mean, into this
24 fund?
25   Q.   Correct. There are two separate

2625

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1    obligations.  There is the copyright fee that
2    goes to the copyright owners, and the
3    retransmission consent fee that goes to the
4    broadcaster for the right to retransmit their
5    signal.
6         A.    I'm -- the only thing that -- is this
7    like what happened with WTBS, that they were --
8    they were paid a fee for the satellite -- for
9    retransmission via satellite while -- that was
10   separate from the other -- I'm not really --
11   I'm lost.
12        Q.    Would you agree that being required to
13   do something can be different than choosing to
14   do something?
15        A.    Yes.
16        Q.    And on page 8 of your written
17   testimony, you testified that if a CSO chooses
18   to add a distant PTV station rather than
19   carrying other distant stations, this reveals
20   that the CSO expects to create more value for
21   itself and its subscribers by carrying that PTV
22   station?
23        A.    Right.  And the same would apply
24   for -- if you take out PTV and put something
25   else in.  Whatever they choose, they are
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1    revealing that they prefer one over the other.
2         Q.    Right.  And I believe you testified
3    earlier that -- with Mr. Garrett, that
4    sometimes there is no local PTV station, where
5    a cable operator is importing a distant PTV
6    station; is that correct?
7         A.    Sometimes that is true, yes.
8         Q.    Are you aware that where there is no
9    local PTV station, the FCC requires the cable
10   system to import a distant signal?  A distant
11   PTV signal?
12        A.    You know, I know there are rules on
13   this, but I don't think that those rules -- I
14   don't think they require them to import the
15   distant signal and pay the -- pay the royalty
16   for this.  I didn't think that was the case.
17        Q.    So your understanding is that the
18   cable operators don't have to pay to import a
19   distant PTV signal if there is no local signal?
20        A.    I don't know the rules exactly, but I
21   thought that they were not -- I thought that
22   there was a -- that there was something about
23   -- I don't think this is what you're talking
24   about -- I thought there was something about
25   what was local for PTV was different in terms
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2627

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1    of the rule -- in terms of what's local for
2    this.
3         Q.    Correct.  And there's local PTV rules
4    that are --
5         A.    So there's the -- what used to be
6    called the grade B contour and 35-mile radius,
7    that.  That's the only part that I was -- I was
8    aware of, and I thought in those circumstances
9    that there wasn't an extra fee, but the rules
10   are what they are.
11        Q.    And you may be talking there about a
12   qualified local NCE, FCC's lingo for a PTV
13   station, non-commercial, but this is actually a
14   separate concept of the distant PTV station
15   where there is no qualified local NCE.
16        A.    Okay.  I'm not -- I'm not aware of
17   that.
18        Q.    Do you think that in evaluating
19   changed circumstances from 2004 and 2005 to
20   2010 to 2013, it would have been important to
21   understand disparate retransmission consent
22   obligations between PTV stations and other
23   stations or mandatory carriage requirements
24   between PTV stations where they don't exist for
25   commercial stations?
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2628

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1         A.    On the carriage requirements, the one
2    that you mentioned about PTV, if there was a
3    distant brought in where there is no local,
4    that would not have -- there would not have
5    been fewer local stations in the area served by
6    cable between the two time periods that we're
7    talking about.
8              It wasn't that there were -- I would
9    be very surprised to see that.  So I did not
10   look at -- I did not look at that.
11             On the other part, I'm -- I did not
12   look into the -- what the retransmission
13   consent things that you were talking about or
14   the -- or the other topic.
15        Q.    Do you think that would have been
16   important to look at?
17        A.    I did not -- I didn't think they were
18   important, and if they are, someone could point
19   them out.
20        Q.    So just to clarify that, it wouldn't
21   be important to know whether it was much more
22   expensive, even separate from the compulsory
23   copyright licensee, for a broadcaster to carry
24   a commercial station and free, aside from the
25   compulsory license fee, to carry a PTV station?
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2629

1   A.   I just don't understand the question.
2 I mean, I don't -- I don't understand -- I
3 don't understand what it is that you're
4 positing that there are -- there are payments
5 for carrying just a distant? I'm -- I want to
6 carry a distant station, commercial station
7 from Boston and I'm in Washington.
8   Are you saying -- are you saying
9 hypothetically that in order to do that, first
10 I have to pay the Boston station? And it's not
11 just for the getting it here; it's the -- it's
12 for the --
13   Q.   For the right to carry that signal.
14   A.   And, in addition, I have to pay for
15 this?
16   Q.   You have to pay the copyright owners
17 or the compulsory licensee to compensate the
18 copyright owners.
19   A.   And that would apply to every station
20 that I wanted to carry that was commercial?
21   Q.   There are certain exceptions for
22 super-stations, so setting aside WGN, but for
23 the most part, um-hum.
24   A.   Well, I was not aware of that, and I'm
25 not sure whether it would affect the analysis

2630

1 or not.
2   Q.   So, hypothetically, I'm a CSO and I'm
3 paying the minimum -- you're aware that there
4 is a minimum compulsory license fee that --
5 regardless of whether you import a distant
6 signal or not, correct?
7   A.   Yes.
8   Q.   So if I'm a CSO and I have to pay a
9 minimum fee regardless of if I import or not, I
10 could choose to carry a PTV signal for free,
11 there's no separate retransmission consent fee,
12 or I could elect to carry a commercial
13 broadcast station but would presumably have to
14 pay a little extra for that one?
15   A.   Except if it was WGN.
16   Q.   Unless it was WGN.
17   A.   Okay. Well, it's possible that that
18 explains, in part, why WGN went up and PTV went
19 up but not why PTV went up more than WGN.
20   Q.   And then if, though, from 2004 to
21 2005, those retransmission consent fees that
22 are paid to commercial broadcasters went from,
23 say, 215 million in the aggregate to 3.3
24 billion or some other comparable dramatic
25 trend --

2631

1   A.   For distant imports, 3 and a half
2 billion?
3   Q.   For retransmission consent, both
4 distant and local.
5   A.   Well, but -- but how much of is that
6 is distant? I mean --
7   Q.   Do you know?
8   A.   I don't know.
9   Q.   But if it -- if it went up
10 commensurate with local, wouldn't that possibly
11 suggest a reason why more PTV is being carried
12 rather than -- and less commercial stations are
13 being carried? Fewer commercial stations are
14 being carried?
15   A.   Yes, but it wouldn't -- I don't see
16 how it would affect the division of the royalty
17 pool because we're looking at what people are
18 paying for what they're carrying, not what
19 they're not carrying.
20   Q.   But if we're talking about revealed
21 preference, it's not necessarily a -- if it's
22 between carrying something for free and
23 carrying something that's going to cost a lot
24 more and you have to pay that minimum fee no
25 matter what, do you think that affects the

2632

1 revealed preference?
2   A.   It would affect the carriage
3 decisions. But it wouldn't affect the -- if
4 they don't carry it, then it wouldn't affect
5 the distribution of the royalties for what they
6 didn't carry.
7   Q.   Let's turn to Dr. Gray's viewing
8 study. So you testified that increases in
9 relative viewing of the category can indicate
10 that subscribers value it to a greater extent.
11 Is that correct?
12   A.   Yes.
13   Q.   On page 8.
14   A.   Yes.
15   Q.   This assumes that Dr. Gray's viewing
16 measure is reliable, correct?
17   A.   To the extent that -- right, it's --
18 the -- the example is true, whether or not, but
19 if --
20   Q.   Your citation to Dr. Gray's viewing
21 study is a suggestion that viewing has
22 increased?
23   A.   Right. Right, if his viewing study is
24 incorrect, then it's not showing what it's --
25 originally showed.

2633

1   Q.   And you haven't independently assessed
2 the reliabilities -- reliability of Dr. Gray's
3 viewing hour estimates, have you?
4   A.   No.
5   Q.   And you also testified on page 21
6 that, based on Dr. Gray's data, PTV's share of
7 distant compensable viewing increased from
8 19.8 percent in 2004 to 27.1 percent in 2010 to
9 2013, an increase of 31 percent. Do you see
10 that?
11   A.   What page?
12   MR. DOVE: Objection, Your Honor. We
13 think this is the wrong version of the -- of
14 Ms. McLaughlin's testimony on the screen.
15   MS. NYMAN: It should be 3112.
16   THE WITNESS: Yes, that is the version
17 that we're not using.
18   JUDGE BARNETT: Thank you, Mr. Dove.
19 We'll fix that.
20   Right, Ms. Nyman?
21   MS. NYMAN: Yes.
22 BY MS. NYMAN:
23   Q.   Okay. We've got 3012 up on the
24 screen.
25   A.   Yes.

2634

1   Q.   So let's be precise here. When you
2 say that there was an increase in viewing, we
3 mean viewer hours, not number of viewers,
4 correct?
5   A.   Right. It could be the same viewer
6 viewing it all those thousands of hours but,
7 you know, yes, it was viewers, but it was more
8 -- it doesn't count different viewers. It's
9 viewing hours.
10   Q.   And looking at this chart, devotional
11 viewing share also increased; is that correct?
12   A.   Yes.
13   Q.   But the data and estimation
14 methodologies in 2004 and 2005 are very
15 different from what was used in this
16 proceeding; isn't that right?
17   A.   After Dr. Gray submitted this report,
18 there were criticisms of his -- of his viewing
19 hours. And before those criticisms, it wasn't
20 clear that they're -- you know, they purported
21 to be comparable.
22   Q.   But, for example, Dr. Gray's now using
23 National People Meter data instead of sweep
24 data? Were you aware?
25   A.   Yeah, well, I'm not sure what Dr. Gray

2635

1 is actually -- is using now, but, you know,
2 there are differences between people meter data
3 and sweeps data, but it's -- it's not that
4 they're irreconcilable.
5   Q.   Well, for example, National People
6 Meter data doesn't cover all geographical
7 markets for either distant or local viewing,
8 correct?
9   A.   That's correct.
10   Q.   And in contrast, sweeps data does
11 cover all markets and it's weighted to estimate
12 market-level viewing, correct?
13   A.   Yes, but there is always a difficulty
14 in getting measures of viewing of distant
15 stations, you know, viewing of the stations in
16 the places where they're distant. And that has
17 been the case no matter which measure was used.
18   Q.   So you acknowledge that they're
19 different, that the data that's being used in
20 the 2004 and '05 and --
21   A.   Yes, but I don't know that that
22 problem is of particular importance.
23   Q.   Earlier you acknowledged also that you
24 were aware that Dr. Gray's viewing data in this
25 proceeding -- sorry, strike that.

2636

1   Were you aware that the viewing data
2 in this proceeding doesn't include WGNA?
3   A.   I -- only because of something that I
4 don't think I'm supposed to talk about.
5   Q.   I believe we're allowed to acknowledge
6 the fact that a correction was submitted. We
7 just won't elaborate on, you know, the contents
8 of what was done afterwards.
9   A.   I didn't know we could talk about the
10 reason why the correction was made. But I am
11 -- I read the corrected report, so I am aware
12 of it.
13   Q.   And there's no PTV on WGNA; is that
14 correct?
15   A.   That's correct.
16   Q.   Lastly, you also cite to the Crawford
17 and Israel regression methodologies to show
18 growth -- you cite to the Crawford and Israel
19 methodologies to show a growth in PTV's
20 relative value?
21   A.   Yes, I do.
22   Q.   But similar to the Gray viewing hour
23 study, you haven't independently examined
24 whether the Crawford or Israel regressions are
25 reliable, have you?

2637

1   A.   I mean, I've looked at them, but I
2 have not -- right. I -- I am not saying, you
3 know, this is the right way to do it. I've
4 looked at other -- I've seen the criticisms
5 that were made and also the, you know, slight
6 changes that were made, and none of them, none
7 of those things made me say like, you better
8 not -- you know, you better not rely on these.
9   Q.   But you didn't look at the data and
10 run your own tests?
11   A.   I did not run my -- I did not run a
12 separate regression, no.
13   Q.   And you didn't independently conduct
14 any tests on the sensitivity, did you?
15   A.   No.
16   Q.   Thank you.
17   MS. NYMAN: No further questions.
18   JUDGE BARNETT: Additional
19 cross-examination?
20   MR. ERVIN: One more, Your Honor.
21   CROSS-EXAMINATION
22 BY MR. ERVIN:
23   Q.   Good afternoon, Ms. McLaughlin. My
24 name is Dave Ervin and I'm here on behalf of
25 the Commercial Television Claimants.

2638

1   A.   Okay.
2   Q.   I want to go back to your changed
3 circumstances method that you've applied. I
4 think it is represented in your direct
5 testimony and followed up in your rebuttal
6 testimony. Is that an accurate statement?
7   A.   I don't think that -- I don't think
8 the changed circumstances was followed up in
9 the rebuttal, but it is represented in the
10 direct testimony.
11   Q.   So to do, that let's look at your
12 direct testimony, which is Exhibit 3012, and on
13 page 2. And as I understand it, as you
14 described it, you need a starting point to do
15 the changed circumstance analysis; is that
16 fair?
17   A.   Yes.
18   Q.   Okay. And at page 2, I think you said
19 the appropriate method for determining the
20 relative marketplace value of distant PTV
21 stations is to adjust the results of a 2004-'05
22 average share awarded.
23   A.   Yes, I say that's an appropriate -- an
24 appropriate method.
25   Q.   Okay. And that's the starting point

2639

1 that you use and it's referenced in both your
2 Table 1 and your Table 2, which we'll get to in
3 just a minute, but that's the starting point?
4   A.   Exactly.
5   Q.   Okay. And then further down, also on
6 page 2, you talk about the relative increase in
7 carriage of distant PTV stations, the distant
8 subscriber instances. Right?
9   A.   Yes.
10   Q.   And you say that that indicates that
11 the relative marketplace value of distant PTV
12 signals has increased. That's kind of like the
13 starting point for determining if there's a
14 change of circumstance?
15   A.   Well, it was my starting point because
16 that was the first thing that I saw, and it
17 seemed -- I had looked at changed circumstances
18 before, and there was less of a change and this
19 seemed to be a bigger change.
20   So I -- but it would -- you know,
21 anything could be the starting point. That's
22 just where I started.
23   Q.   Okay. And at the bottom of 2,
24 continuing to 3, also the same exhibit, the
25 bottom there where it begins the relative

2640

1 increase, here you're talking about the
2 relative increase in the distant instances for
3 PTV signals can provide -- the relative
4 increase in carriage alone can provide the
5 basis for determining the increase in the PTV
6 value. Is that right?
7   A.   That's not what the sentence says. It
8 says based on this increase in carriage alone,
9 based on this alone, this is what happens.
10 It's not --
11   Q.   Okay.
12   A.   -- that the -- that you could base it
13 on that alone. I would -- since it's a unit
14 measure, I would always want to check to see if
15 there's anything that indicated that the value
16 went down even though the units went up or
17 didn't go up as much. It would be odd for it
18 to go down while the units went up, but I
19 suppose that's theoretically possible.
20   Q.   Okay. Let's go to page 12, also in
21 your direct testimony, Exhibit 3012. And
22 there's -- on page 12 there's a passage that
23 begins -- we'll wait for it up here for you --
24 "based solely on this measure." Let me find it
25 for you on here. Yeah. Thank you, Bob.

2641

1   "Based solely on this measure" --
2   A.   Right.
3   Q.   -- and the measure being the distant
4 carriage increase --
5   A.   Right.
6   Q.   -- for PTV?
7   A.   Right.
8   Q.   And that's comparing '04-'05 to
9 2010-'13?
10   A.   Correct.
11   Q.   So based solely on this measure,
12 assuming there were no other evidence of
13 changes in the relative value, an appropriate
14 distribution for 2010 through 2013 for PTV
15 would be to increase its share of the basic
16 fund in proportion to its growth in distant
17 subscriber instances.
18   A.   Right. In other words, that's just
19 what I said before, if we base it just on this,
20 and assuming there's no other evidence of
21 changes, that nothing else changed, that that
22 would happen.
23   Q.   Okay. And as for -- the first part, I
24 want to come back to, but in proportion to the
25 growth in the distant subscriber instances,

2642

1 that's all we're talking about so far at this
2 point in your report, right?
3   A.   Right.
4   Q.   Okay. If I could look at Table 1,
5 which is on page 13 of Exhibit 3012.
6   A.   Yes.
7   Q.   Which is your first table. And here
8 we start with the 7.55 percent, which is the
9 share that was awarded to Public Television in
10 the '04-'05 case, right?
11   A.   Yes.
12   Q.   And then you've calculated for each of
13 the relevant years here, 2010, '11, '12, and
14 '13, the relative percentage increase of
15 distant subscriber instances, right? That's
16 the 23 percent?
17   A.   Yes, the --
18   Q.   35 --
19   A.   Yes, based on -- right, based on PTV's
20 share of distant subscriber instances.
21   Q.   Okay. And then you've applied that
22 increase, the '04-'05, to 2010-'13 increase in
23 each year, to the 7.55 share from '04-'05?
24   A.   Yes, mathematically.
25   Q.   Right. Mathematically, right? And

2643

1 that gets the updated shares that are there --
2   A.   Yes.
3   Q.   -- right? And no other change has
4 been made? No other --
5   A.   No. It --
6   Q.   -- consideration has been applied to
7 that yet?
8   A.   To that calculation, no. That's what
9 it is.
10   Q.   Okay. So I want to see -- I thought
11 there might have been a couple of
12 qualifications in your direct testimony that I
13 just wanted to just confirm. The first one
14 would be footnote 18 on page 11, also of
15 Exhibit 3012. And this is the part when -- if
16 you're at it, Ms. McLaughlin, yourself.
17   A.   Yes, I am.
18   Q.   Okay. This is the part where you
19 reference multi-cast signals.
20   A.   Yes.
21   Q.   It's Exhibit 3012 where we just were.
22 It's page 11, footnote 18. Okay.
23   And I believe you were having a
24 conversation with Mr. Garrett before about
25 multi-cast signals. And I just want to ask

2644

1 about a specific reference you make there where
2 it says, "The use of multi-cast signals is
3 responsible for some of the increase in the use
4 of distant PTV signals."
5   A.   Yes.
6   Q.   What did you mean by that?
7   A.   I mean that that increase in
8 subscriber instances from, I think it was 12.1
9 to 15.9 percent, part of that change, the
10 change in between the two, part of the
11 3.8 percent point increase is multi-cast, which
12 didn't exist before, being imported.
13   And the other part is not multi-cast.
14 It's just a regular PTV station.
15   Q.   Okay. And does that -- in your view,
16 did that do anything to or make you look at the
17 percentage change calculation that you had made
18 in distant subscriber instances?
19   A.   No, it was -- it was just that, you
20 know, here's something new that's being
21 carried.
22   Q.   Okay.
23   A.   So it was kind of a reason why there
24 might be an increase. Something new existed,
25 and people were carrying that.

2645

1   Q.   Okay. And if we could go to page 17,
2   also in Exhibit 3012, there's another reference
3   to this same issue that I just want to confirm
4   with you. You're discussing at this point the
5   cable operators surveys, but you make a
6   notation there near the bottom where it reads,
7   "we noticed several large systems with PTV
8   multi-cast stations -- a major factor
9   underlying the increase in relative PTV
10 carriage."
11   Do you see that?
12   A.   Yes.
13   Q.   My first question is it some or is it
14 major?
15   A.   It's half.
16   Q.   Half? Okay. And, again, you're
17 noting that it was something that contributed
18 to the increase in the PTV signal carriage?
19   A.   Right. Right, and it was -- it was --
20 this was something that didn't exist before,
21 exists now. It was part -- it was -- as far as
22 the change goes, it was, you know, half of the
23 change and these -- the large systems that were
24 carrying regular PTV but also multi-cast that
25 weren't in the Bortz survey, but were in the

2646

1   Horowitz. That's what I found.
2   Q.   Okay. And then if we could go back to
3   page 12, also in Exhibit 3012, and this is the
4   reference that we were talking about before.
5   There was one other -- what I think was a
6   qualification to the use of the increase.
7   Let's wait until we get there.
8   A.   Based solely on this measure?
9   Q.   Yes, that sentence right there. Based
10 solely on this measure, assuming there were no
11 other evidence of changes in the relative value
12 of PTV programming.
13   A.   Right.
14   Q.   And by that, is it -- that's the
15 second part of your direct testimony, right,
16 where you're examining the expert --
17   A.   Right. So first I look just at the
18 units and say pretty big, you know, change
19 here, but what happened to the value? And then
20 I look at these value measures.
21   Q.   Okay. Now, had you -- was that part
22 of your consideration before you had looked at
23 the expert reports that were submitted by the
24 other claimants or was it after?
25   A.   Well, I didn't have the evidence of

2647

1   value until after I got the other people's
2   expert reports. But then -- but the -- but the
3   sentence would have applied had I not gotten
4   it, assuming that -- if you know what I mean.
5   Q.   I think I do, but let me make sure.
6   So the other expert reports that you
7   talk about in your direct testimony, and it's
8   in here in your direct, your written direct
9   testimony, you're talking about the receipt of
10 those, the review of those, and now in your
11 changed circumstances method, using them as a
12 basis to establish a value measure --
13   A.   Right. First is the --
14   Q.   -- I think is the word you used
15 before, right?
16   A.   First using them to see that the value
17 went up, at least as much as the units.
18 Because it might not have. And then looking at
19 them to see, you know, how much it did go up by
20 these different value measures.
21   Q.   Okay. I think I've heard through your
22 direct and through some of the other
23 questioning and having read this that there's
24 not another basis that you're relying on, other
25 than what's discussed in your direct testimony,

2648

1   which is your review of the various other
2   studies. Is that accurate?
3   A.   In terms of whether or not there's
4   other evidence of changes in relative value of
5   PTV programming, besides that?
6   Q.   Exactly.
7   A.   Right. So that if I didn't have the
8   other studies, all I would be able to say is,
9   based on changes in measures that I could get
10 from CDC, particularly units measures, but, you
11 know, any other measures that they had, the
12 changes in those measures would have shown an
13 increase of, you know, at least 32 percent or,
14 you know, in that range, but I think that then
15 my report would be of more limited use because
16 it would -- it would have been subject to,
17 well, do you know whether the value changed?
18 Well, you know, I don't.
19   So I don't know it did. I don't know
20 it didn't. But it would be up to some -- you
21 know, it wouldn't be as strong as having these
22 other measures of value.
23   Q.   Okay. Let me ask -- I want to ask you
24 a couple questions about your discussion of the
25 other measures of value. So the first one

2649

1   would be on page 15 of Exhibit 3012. And this
2   is the part where you're talking about the
3   cable operator surveys.
4   A.   Yes.
5   Q.   And you're specifically making an
6   observation about the augmented Bortz results
7   that you had calculated and that you've already
8   talked about today, right?
9   A.   Yes.
10   Q.   Okay. And, specifically, you're
11   talking about here a comparison and you're
12   noting that the increase in the augmented Bortz
13   results from '04-'05 to 2010-'13 show an
14   increase that ranges between 24 and 37 percent
15   or about 31 percent on average and that "this
16   is in line with the 32 percent change due to
17   the increase in distant PTV subscriber
18   instances alone."
19   A.   Right.
20   Q.   Right? So that observation that you
21   noted there, what did that do for you? Did it
22   confirm that your calculation was -- on the
23   distant subscriber instances was accurate? Was
24   it --
25   A.   No, what it did for me was to show

2650

1   that when you -- when you have a value measure,
2   that the value went up about the same as the
3   units; therefore, the unit -- the value didn't
4   go down. Like from that other sentence you
5   were asking me about, you know, assuming no
6   change in value, well, this one is basically
7   saying there's no change in value; it's just --
8   in the value by itself, the value didn't go up
9   more or less than the units.
10   Q.   I mean, what I'm wondering is if --
11   is -- does the alignment confirm for you when
12   you were doing your analysis that the augmented
13   Bortz results right there, they're reflecting
14   the increase, or because it aligns, or are you
15   just using that as a reference point to say,
16   oh, I'm on the right track?
17   A.   No, it's because it aligns and it's
18   also because the other ones are higher that I
19   know that the value went up at least as much as
20   the units.
21   Q.   And by "the others," you mean the
22   other value measurements that you were talking
23   about?
24   A.   The other value measurements, yes.
25   Q.   Okay. Let's talk about -- for a

2651

1   moment about your discussion on the econometric
2   studies. So if we could turn to page 18, also
3   still in Exhibit 3012. And here you're talking
4   about the econometric studies from Drs.
5   Waldfogel and Crawford. And you start out with
6   a reference that they supplied analysis on a
7   seemingly comparable basis. Do you see that?
8   A.   Yes.
9   Q.   Okay. Now -- and you just were asked
10   a question about sort of how you carefully
11   reviewed them. But did you review them at a
12   level to become familiar with how they might be
13   different and how they might be similar?
14   A.   Yeah, and I particularly noted that
15   Dr. Crawford said he did pretty much the same
16   thing but he made three changes. But the
17   changes were generally like instead of using
18   only minutes based on some short period of
19   time, he used all the minutes. Instead of +--
20   there were three changes and I'm going to lose
21   them, but two, at least two of them were just
22   greater precision in measurement. And I think
23   the other one was subscriber groups. But in
24   Waldfogel, he used -- he used distant,
25   partially distant as a -- he considered partial

2652

1   distants.
2   So subscriber groups and partial
3   distants kind of relate to each other.
4   Q.   Right, okay. If we stay on page 18
5   there, right, I guess where we are, I think
6   right there, yeah, really the next sentence, it
7   reads -- you're making a reference to the value
8   of each minute of programming. Right? So
9   you've had some questions today -- you're
10   talking about this value measure being used in
11   your changed circumstances model, right?
12   A.   Right.
13   Q.   And, again, you're comparing the PTV
14   share from '04-'05 against the estimations that
15   are coming out of, in this case, Dr. Crawford's
16   regression, right?
17   A.   Crawford compared to Waldfogel.
18   Q.   Compared to Waldfogel, right.
19   A.   Right.
20   Q.   And, specifically, one of those things
21   that you're comparing is the marginal value per
22   minute that's estimated for both?
23   A.   Right. I looked at the marginal value
24   per minute, right.
25   Q.   Okay.

2653

1   A.   And that was a direct indicator of
2   value by itself as opposed to a mix of -- I
3   mean, it was a direct -- it was on the price
4   side as opposed to the quantity side where the
5   value is, you know, a quantity times a price,
6   right?
7   So when other people -- like in the
8   surveys, you only have a value percent. You
9   don't have a price percent and a units percent,
10 right? It's sort of built in underneath, but
11 they're splitting it out.
12   In the comparison between Waldfogel
13 and Crawford, he has his -- he specifically
14 states a price at a level that's comparable to
15 Waldfogel.
16   Q.   Okay. And when you were doing your
17 review, did you look to the level of detail to
18 determine if those marginal values were
19 statistically significant under both Waldfogel
20 and Dr. Crawford?
21   A.   The -- Waldfogel's value was not
22 statistically significant but Crawford's was.
23 And so -- and Crawford's, I believe that the
24 outside limit at the bottom for Crawford would
25 have been like just barely touching the

2654

1   4.2 percents that Waldfogel said, so do you
2   know what I mean? Like the 5.1 would go from
3   something like 4 to 6. I mean, approximately.
4   Something in that range.
5   Q.   Yeah. Actually, I first want to look
6   at it the other way. So if you --
7   A.   If you looked at it the other way,
8   since Dr. Waldfogel's cents measure was not
9   significant, then it would -- the 5.1 cent
10 would be within the bounds on the 4.2, which
11 could go from 0 to 8, something like that.
12   Q.   Right, yes. So you did read it to
13 that level of detail.
14   A.   Yes.
15   Q.   Okay. So then it would be accurate to
16 say then that the value that's estimated under
17 Dr. Crawford's model for PTV is within those
18 confidence intervals from Dr. Waldfogel's
19 estimates from the '04-'05 case?
20   A.   But not vice versa, depending on the
21 level of significance that you went to.
22   Q.   And so -- and then if I'm -- if we're
23 on the same page there, would you agree that
24 there's no statistical basis for us to be able
25 to assert that those two numbers are different

2655

1   from each other for the purposes that you're
2   using them here, right?
3   A.   Certainly if you start with Waldfogel,
4   that's true. If you start with Crawford,
5   there's a high probability that they're
6   different. So -- but I was just using them as
7   a point estimate and as something that showed
8   that there was an increase in the price
9   variable.
10   If we didn't have that information, we
11 could just say, well, there's an increase in
12 the value, so we can -- and just go with that.
13 We didn't have to have the price change. I
14 just liked the fact that here's somebody who
15 estimated just the other piece that I didn't
16 have any -- any chance to look at. In
17 subscriber instances.
18   Q.   Okay. Let's take a look at your Table
19 2, which is on page 24 of Exhibit 3012.
20   A.   Yes.
21   Q.   And I'll wait until we get there.
22   I just wanted to note, as we did on
23 Table 1, so we're starting -- you're starting
24 with the PTV share from '04-'05 all the way
25 across the top, right?

2656

1   A.   Yes.
2   Q.   7.55. And then the percentage
3   increases that you're showing in the growth in
4   PTV share, the way you've already described
5   subscriber instances because that's your Table
6   1, right?
7   A.   Right.
8   Q.   And then the rest of them that you do
9   there, you're calculating the percentage
10 increase year to year and then expressing it
11 down below on what's called the updated share?
12   A.   Yes.
13   Q.   Right?
14   A.   Right. So that -- so that, say, you
15 were looking at Crawford, so on the top line
16 under Crawford is 7.55 percent. That was the
17 share from '04-'05. For the whole period,
18 there was a 176 percent increase. So if you
19 multiply 7.55 times 2.76, to get the whole
20 increase in, you come to 20.8.
21   Q.   Okay. And the calculations that
22 you've made are only those, right? As you're
23 applying the percentage change that you
24 calculated in expressing it in the share
25 percentage, right?

2657

1   A.   Yes.
2   Q.   Okay. I think you had testified,
3 maybe in your direct, that your opinion was
4 that the Public Television share would be at
5 least 9.9 percent but probably greater than
6 that based on other value measures.
7   A.   Right.
8   Q.   I think I heard you right; is that
9 right?
10   A.   Yes.
11   Q.   And by "other value measures," you
12 mean your calculations here that you've
13 provided for the Judges; is that right?
14   A.   Right. Based on -- right. Yes.
15 Horowitz, Crawford, and Israel.
16   MR. ERVIN: I have no further
17 questions. Thank you very much,
18 Ms. McLaughlin.
19   JUDGE BARNETT: Cross-examination by
20 the Canadian Claimants group?
21   MR. SATTERFIELD: No, ma'am.
22   JUDGE BARNETT: Redirect, Mr. Dove?
23   MR. DOVE: No, Your Honor.
24   JUDGE BARNETT: Anything further for
25 this witness? Thank you very much,

2658

1 Ms. McLaughlin. You may be excused.
2   THE WITNESS: Thank you.
3   JUDGE BARNETT: Here we are again. I
4 think by agreement, Dr. Erdem will appear
5 tomorrow?
6   MR. MacLEAN: Yes, Your Honor.
7   JUDGE BARNETT: And my surmise is that
8 his testimony will last all day. Anybody have
9 any contrary surmising? All right.
10   And this is a week we do not have
11 Friday session. So we'll see you all tomorrow.
12 We'll see if we can get through Dr. Erdem
13 tomorrow and go from there.
14   Thank you very much. We're at recess
15 until 9:00 o'clock in the morning.
16   (Whereupon, at 2:58 p.m., the trial
17 recessed, to reconvene at 9:00 a.m. on
18 Thursday, March 8, 2018.)
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1   C O N T E N T S
2 WITNESS: DIRECT   CROSS   REDIRECT   RECROSS
3 LINDA McLAUGHLIN
4   By Mr. Dove   2437
5   By Mr. Garrett   2488
6   By Ms. Dominique   2594
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11   CONFIDENTIAL SESSIONS: 2501-2529
12   E X H I B I T S
13 EXHIBIT NO: MARKED/RECEIVED   REJECTED
14   1096   2490
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18   1100   2490
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20   1003   2490
21   1004   2490
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1   CERTIFICATE
2
3   I certify that the foregoing is a true and
4 accurate transcript, to the best of my skill and
5 ability, from my stenographic notes of this
6 proceeding.
7
8
9 3/7/18   Karen Brynteson
10 Date   Signature of the Court Reporter
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